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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI FOR IMPERATIVE PUBLIC IMPORTANCE

RAMON A. MEDINA, P.E., Individually and as
Parent of Luis-Francisco Emanuel Medina, Deceased;
MARIA TERESA MEDINA, Individually and as
Parent of Luis-Francisco Emanuel Medina, Deceased,
Plaintiffs - Appellants;

vs.

JOHN P. DEVINE, Honorable, ET AL,
Defendants

JOHN P. DEVINE, Honorable,
Defendant - Appellee.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT BEFORE ENTRY OF JUDGMENT

DANIEL J. SHEA
Counsel of Record for Appellants
Texas Bar No. 18163850
1001 Fannin, Suite 4660
Houston, TX 77002-6712
(713) 651-7800
(713) 652-9051 Facsimile

113 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER A DISPLAY OF SECTARIAN RELIGIOUS TEXTS AND OTHER RELIGIOUS IMAGERY IN A TRIAL COURTROOM: IN THE JURY BOX, OVER THE WITNESS STAND AND JUDGE, AND ON OTHER WALLS IN PLAIN VIEW OF A JURY VIOLATES THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

2. WHETHER A DISPLAY OF SECTARIAN RELIGIOUS TEXTS AND OTHER RELIGIOUS IMAGERY IN A TRIAL COURTROOM: IN THE JURY BOX, OVER THE WITNESS STAND AND JUDGE, AND ON OTHER WALLS IN PLAIN VIEW OF A JURY VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Other questions concerning mootness, judicial disqualification, mischaracterization of evidence, and the like, currently before the United States Court of Appeals for the Fifth Circuit, are subsidiary questions fairly included herein and do not fall within the ambit of Rule 11 of this Honorable Court.

PARTIES

THE FOLLOWING IS THE LIST OF INTERESTED PERSONS CURRENTLY ON FILE BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Plaintiffs below:

RAMON A. MEDINA, P.E. and MARIA TERESA MEDINA, Individually and as Parents of LUIS-FRANCISCO EMMANUEL MEDINA, Deceased;

Defendant below:

HON. JOHN P. DEVINE, JUDGE, 190TH JUDICIAL DISTRICT COURT, HARRIS COUNTY, TEXAS;

Counsel for defendant appellee:

THE ATTORNEY GENERAL OF THE STATE OF TEXAS;

Class below for whom certification was denied:

CLASS OF SIMILARLY SITUATED PLAINTIFFS BEFORE THE 190TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS;

Intervenors below for whom intervention of right was denied:

HOUSTON FEDERATION OF TEACHERS;

Spouse of judge below and political advisor and fundraiser for appellant, Judge Devine:

MR. FRANK HARMON, ATTORNEY, HOUSTON, TEXAS.

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RULE 11 STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is presented pursuant to 28 U.S.C. § 2101(e) for the reasons of imperative public importance set forth to the Court below by letter of Counsel to Hon. Frances Stacy, United States Magistrate Judge, then presiding, dated March 17, 1997, found at **Appendix H**. As of the date of this filing, the case is pending before the Unites States Court of Appeals for the Fifth Circuit, Case No. 97-20369. An Order of Expedited Appeal, **Appendix I**, was entered on September 10, 1997, but oral argument has not been set as of the date of this filing.

Briefly summarized, the "Ten Commandments in the Courtroom" phenomenon has precipitated threats from a sitting governor that he will use military force to stop a court-ordered removal of the Ten Commandments from a trial-courtroom, a partisan resolution of the United States House of Representatives supporting what is patently unconstitutional behavior, concurrent threat of a sitting Member of Congress to impeach federal judges who do not share his "values," and a public admonition of impending constitutional crisis from the Attorney General of the United States.

Finally, the type of damage to our constitutional governance at issue here is irremediable absent swift action by this Court. *See Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981).

STATEMENT OF THE CASE[1]

(i) Course of proceedings and disposition in the Court below:

An original complaint was filed on August 5, 1996. It was superseded by a First Amended Complaint for Injunctive Relief on August 30, 1996. This is the live pleading [Inst. 8]. Motions to Disqualify and Recuse Hon. Melinda Harmon were filed on August 12 and 27, 1996 [Inst's. 4, 6]. They were both denied on October 4, 1996 [Inst. 13 (Appendix Tab 3)]. The disqualification and recusal issues were mooted on November 4, 1996 when the parties agreed to trial by U. S. Magistrate Frances H. Stacy and Judge Harmon approved [Inst. 23]. Plaintiffs filed a Motion for Summary Judgment with attached Findings of Fact and Conclusions of Law of Hon. Andrew Z. Baker on December 6, 1986 [Inst. 26 (Appendix Tab 6)], **Appendix B.** The motion was heard on January 27, 1997 as reported in Transcript of Proceedings [Inst. 55]. The parties stipulated to all essential facts at that hearing. Various post MSJ motions were filed as directed by the Court at that hearing. [Inst's. 28-34, 36-37]. Photographs of the courtroom were filed on February 3, 1997 without objection [Inst. 35]. On March 19, 1997, Hon. Frances H. Stacy recused herself, *sua sponte*, without explanation [Inst. 39] and the case reverted to Judge Harmon.

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[1] Bibliographical Note: Instrument Numbers are references to the Docket Sheet entries for the U. S. District Court for the Southern District of Texas, Houston Division, **Appendix D**, hereto. Appendix Tab Numbers are references to Appellant's Record Excerpts on Appeal in Case No. 97-20369 before the United States Court of Appeals for the Fifth Circuit. Appendices to this petition are in boldfaced type.

On March 20, 1997, plaintiffs moved Judge Harmon to reconsider recusal [Inst. 41]. On April 2,1997 Judge Harmon signed a Memorandum and Order of Dismissal denying recusal and dismissing the case on mootness grounds [Inst. 44], **Appendix A**. Subsequently, plaintiffs moved for leave to file amended complaints [Inst's. 45, 59]. Both amendments were denied [Inst's. 56, 60]. There were intervention issues in the proceeding below but they are not presented on appeal.

(ii) Statement of Facts

The facts relating to the presence of the disputed articles in the courtroom were stipulated at the hearing on the Motion for Summary Judgment [Inst. 26]. The same facts formed the basis for the Findings of Fact and Conclusions of Law of Hon. Andrew Z. Baker [Inst. 26, Exh. "A"], **Appendix B**. However, since that hearing, Judge Devine changed courtrooms and, in the process, relocated some of the scriptural texts in the jury box itself and added two additional texts, Genesis and Revelation, after appellants rebutted his argument that the Decalogue and five additional texts from the Hebrew sacred scriptures was a "mixed Christian-Jewish display." The addition was made the subject of a Motion for Leave to Correct the Record at the Fifth Circuit to include a self-authenticating KPRC-TV videotape of an interview of Judge Devine in his courtroom that shows the amended display and in which he provided his rationale for it being there, **Appendix F.** An Order to Correct or Enlarge was granted by the Fifth Circuit, **Appendix G.**

SUMMARY OF THE ARGUMENT

This is a case of first impression. The defendant-appellee, Judge John Devine, has decorated the walls of his courtroom, the 190th Judicial District Court of Harris County, Texas, with the following articles that have been contested: Over the witness box there is a rendition of the Ten Commandments in the Calvinist sectarian format. In the jury box itself are five passages from the Hebrew sacred scriptures attesting, *inter alia,* to the divine nature of the judge's office. These same scriptural passages are, in part, the proof texts for the Calvinist sectarian creed articulated by John Calvin in his *Institutes on the Christian Religion* written in Geneva in the sixteenth century. Across the courtroom from the jury box is a diptych containing two sacred scripture passages, one from Exodus, the other from Revelation -- attesting to the sectarian notion that the sacred scriptures of the Judaeo Christian tradition are the all-encompassing source of the ethical and legal principles that are the basis of the Western legal tradition. Finally, on the wall behind the judge, adjacent to the Ten Commandments, are portraits of Presidents Lincoln and Washington kneeling in prayer.

At first blush, this case presents a First Amendment issue of church-state separation. However, a closer examination of the historical and legal issues reveal that first and foremost, the display is a direct challenge to the Due Process principle of *stare decisis* and the institutional integrity of the constitutionally created courts of the

United States. In short, the display suggests to jurors that there is a specific source of law, other than the law given them in the jury charge, that they may take into consideration as they reach their verdict. It suggests to the jurors that the admonitions given them to refrain from reference to law books, dictionaries, personal knowledge, sympathy, concern for outcome, decision by lot or chance, and the like are not to be followed strictly, and indeed, that there is a specific exception to that admonition -- which they see on the walls around them. The display further suggests to the jurors that they may reach a verdict in a fashion other than by a strict and logical application of the law to the facts admitted into evidence. For this reason appellants challenge the display on Fifth and Fourteenth Amendment Due Process grounds. Further, appellants contend that the Due Process violation is compounded by the fact that the effect of the presence of the sacred texts is unreviewable on appeal. Appellants, of course, also challenge the display on the basis of its violation of the First Amendment to the United States Constitution. However, in this case, since the display is in the courtroom rather than in the hallways of the courthouse, appellants contend that the Establishment Clause violation cannot be cured by an attempt to expand the display to make it educational in nature. The only education in the law that the jurors may receive in the courtroom is that which is given them by the judge in writing.

Appellants also contend that there is a philosophical nexus between the Calvinist sectarian content of the display and the challenge

this case presents to the institutional integrity of the courts and the principle of *stare decisis*. Only the United States Supreme Court may decide which, if any, sectarian sacred texts are to be given special prominence in our system of jurisprudence. A recitation of the content of the display and an analysis of its sectarian content is found in the record at [Inst. 33, pp. 19-24 (Excerpt Tab 8)], **Appendix E, p. 33.**

Finally, appellants contend that the district court erred in dismissing the case on mootness grounds in that the conduct complained of persists in the courtroom of the 190th District Court, i.e., it is an ongoing constitutional violation that falls within the ambit of, and indeed, exceeds the doctrine of "capable of repetition yet evading review." The on-going nature of the violation is now part of the appellate record by virtue of the action taken by the Fifth Circuit. **See Videotape lodged with transmittal letter.**

LEGAL ARGUMENT

The controlling case pertaining to the Establishment Clause issues here is *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As part of this Court's determination of the meaning of the principles of "separation" and "neutrality" that are implicit within the Establishment Clause, it established in *Lemon* a three-prong test for determining whether a governmental act violates the First Amendment. The prongs of the test, articulated in *Lemon*, were "gleaned" from previous decisions. In order to withstand a First Amendment challenge, the government action 1) must have a secular legislative purpose; 2) must have, as its

principal or primary effect, neither the advancement or inhibition of religion; and 3) must not foster "an excessive government entanglement with religion." *Id.* Although this Court has developed in the last fifteen years two basic tests (the endorsement and the coercion test) to supplement the *Lemon* standard when the *Lemon* three-prong test does not adequately speak to the facts of a particular case, this Court has not overturned *Lemon* and frequently reminds courts that the *Lemon* standard remains intact. In fact, the *Lemon* test remains the primary test for adjudicating religion cases.

Another controlling case is *Stone v. Graham*, 449 U.S. 39 (1980), in which the State of Kentucky's requirement of the posting of the Ten Commandments in public schoolrooms was reviewed under *Lemon* and found to be unconstitutional. Although the state "avowed" that the posting of the document served a secular purpose, this Court disregarded the claim, finding that the preeminent purpose was "plainly religious in nature." 449 U.S. at 41. This Court stated:

> The Ten Commandments is undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact . . . the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day.

Id.

According to a federal district court in Georgia, the context of the display, including its location and physical setting, must be

reviewed to see if its overall effect is to endorse religion. *Harvey v. Cobb County, GA*, 811 F. Supp. 669 (N.D.Ga. 1993), *aff'd* 15 F.3d (11th Cir.1994); *certiorari den'd* 114 S.Ct. 2138 (1994). In that case, the county hung a copy of the Ten Commandments and the Great Commandment attributed to Jesus Christ in the alcove above a marble bench near several courtrooms and the clerk's office. The county argued that the content of the display merely represented a recognition of a "historical, jurisprudential cornerstone of American legal significance." In spite of testimony that the Ten Commandments are one of many sectarian and non-sectarian influences on the formation of Western law and the United States Constitution, the court concluded that since no other law sources were displayed along with the biblical source, the display could not be interpreted as having anything but a religious purpose. The religious display, located high on a wall near the clerk's office and courtroom entrance, was such that no reasonable person could think that it was displayed without the support and approval of the government.

In connection with Rule 11, this Court may judicially notice litigation currently taking place in Alabama against State District Court Judge Roy Moore. In that case, the Presiding Judge, Hon. Charles Price, traveled to Etowah County, Alabama to view the display of the Ten Commandments to see if it fell within the *Harvey* guidelines and concluded that it did not. Noting that Judge Moore admitted that he displayed the religious plaque in order to "promote religion," Judge

Price ruled that Judge Moore must either add secular items so as to create a historical display into which the Ten Commandments were incorporated, or the plaque must be taken down. The federal district court in Georgia that decided *Harvey* offered this important context:

> The Ten Commandments are not in peril. They may be displayed in every church, synagogue, temple, mosque, home and storefront. They may be displayed on lawns and in corporate boardrooms. Where this precious gift can not, and should not, be displayed as a religious text is on government property. For any erosion of the Bill of Rights -- restraints voluntarily imposed by the majority to protect the rights of the minority -- will inevitably produce prejudice and persecution.

Id.

Neither *Harvey* nor the current case in Etowah County, Alabama addressed the impact of the displays on the functioning of a trial court. This case does. Neither was the significance of the presence of the Mayflower Compact in Judge Moore's courtroom noted by the ACLU plaintiffs there. Notwithstanding the mootness dismissal, the Court below did address, in apparent surplusage, the First Amendment issues raised in the live pleadings. However, the Memorandum and Order of Dismissal [Inst. 44] fails entirely to address the due process issues in the pleadings. Plaintiffs presented their due process arguments in the court below. *See* [Inst. No. 33, pp. 26-27, Appendix Tab 8], **Appendix E, pp. 34-39.**

Now, by way of further argument, appellants concede, save

two, each and every recitation by the United States Supreme Court in 1984 of the ". . . official acknowledgment by all three branches of government of the role of religion in American Life from at least 1789." *Lynch, Mayor of Pawtucket, R.I. v. Donnelly et al.*, 465 U.S. 668 (1984). Appellants' recourse to *Lynch* is with two noted exceptions, however. First, the *Lynch* court supported its argument with the notion that "[t]he very chamber on which oral arguments on this case were heard is decorated with a notable and permanent -- not seasonal -- symbol of religion: Moses with the Ten Commandments." *Lynch*, 465 U.S. at 468. Appellants contend that this Court's reference to the Ten Commandments is inapposite to this case for the simple reason that the chamber of the United States Supreme Court is not a trial courtroom in which a jury is empaneled. Second, the *Lynch* Court further supported its argument with the notion that "[b]eginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday . . . ." *Id.* Appellants also addressed the historical significance of that event in the Court below.

In addition to appellants' Establishment Clause arguments *supra,* appellants contend that the appellee's actions violate the Due Process Clauses in that his conduct is a direct challenge to the institutional integrity of our judicial system in which there is but "One Supreme Court." Where the Fifth and Fourteenth Amendments are concerned, "It is a truism to say that this provision of both amendments is not self-explanatory." *Poe v. Ullman,* 81 S.Ct.1752, 1775

(1961)(HARLAN, J., dissenting). In that case, Justice Harlan had argued, *inter alia,* that due process is a discrete concept which subsists as an independent guarantee of liberty and procedural fairness, more general and inclusive than the specific prohibitions." *Id.* at 1776 (citations omitted). Significantly, Justice Harlan spoke to historical tradition where delineation of due process is concerned.

> The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Id. Justice Harlan then spoke of his methodology. "No formula could serve as a substitute, in this area, for judgment and restraint." *Id.*

In a thoughtful and thought-provoking comment on the apparent adoption of Justice Harlan's views by the plurality in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), a distinguished Justice of the Fifth Circuit has written:

> The historical approach thus breaks down into the following conundrum: who decides which liberties were recognized in our history? How do we decide which history or tradition is relevant? The task, however, is not to interpret the words of the Fourteenth Amendment. The federal judiciary is not composed of historians, merely lawyers whose expertise is neither 'history' nor 'tradition.'"

Causeway Medical Suite v. Ieyoub, 109 F.3d 1096, 1117(5th Cir.

1997)(GARZA, J., concurring specially).

Appellants' historical arguments attempt to avoid the ersatz methodological formula of "judgment and restraint" of concern to Justice Garza. What appellants did utilize below is the historico-critical method which juxtaposes historically critical texts in such a fashion as to present the ". . . clash of an adversary contest which is needed to sharpen and illuminate issues . . . and gives aid on which our adjudicatory system has come to rely." *Poe,* 81 S.Ct. at1752. The methodology appellants have used in **Appendix E** produces just such a result as to clearly illustrate the traditions from which this nation developed as well as the traditions from which it broke.

Notwithstanding his disagreement with the adoption of Justice Harlan's thinking in *Casey,* Justice Garza still spoke words which need to ring in this appellee's ears. "For the second time in my judicial career, I am forced to follow a Supreme Court opinion I believe to be inimical to the Constitution." *Causeway,* 109 F.3d at 1113. Significantly, the decision Justice Garza was forced to follow began with the following admonition of this Court: "After considering the fundamental constitutional questions resolved by *Roe,* **principles of institutional integrity, and the rule of *stare decisis***, we are led to conclude that the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Casey,* 112 S.Ct. at 2804 (emphasis added). Appellants contend that the principles of institutional integrity

and *stare decisis* are seriously violated in this case. And should a concern for the "decline of religion" be raised, one may consider what is arguably persuasive religious teaching on the subject.

> In the exercise of their apostolic function, which is directed towards the salvation of souls, bishops enjoy as of right full and perfect freedom and independence from all civil authority. . . . In fact, the sacred pastors in devoting themselves to the care of their flock are in fact promoting social and civil progress and prosperity. With this end in view they cooperate actively with the civil authorities in a manner consonant with their office and fitting for bishops, **enjoining obedience to just laws and prescribing reverence for legitimately constituted authority.**

Vatican II, Decree on the Pastoral Office of Bishops in the Church, *Christus Dominus*, n. 12, 28 October 1965 (emphasis added).

It is not without historical irony that the central case with which both sides here must contend here, *Lynch,* is set in Rhode Island and Providence Plantations, the very colony formed by Roger Williams to escape from the Calvinist sectarianism that Williams found incompatible with democracy. It is the same sectarian intrusion at work in this case. It forms the basis of appellants' Establishment Clause arguments and is the basis for the nexus between the Establishment Clause and the Due Process Clause violations.

To understand the nexus between the Establishment Clause and Due Process Clause violations, appellants rely on a scholarly treatise on the phenomenon of religious "Enthusiasm," the subject of a book of the same name by the late English historian, Ronald Knox, writing

from Oxford in 1950. In his concluding chapter entitled "The Philosophy of Enthusiasm," Professor Knox begins as follows:

'Dear Father, you are truly God, with unexpressible love and power . . . Lina Tegtmayer.'

'My dear Mrs. Tegtmayer, Your beautiful letter of praise and thanksgiving is at hand, and it is indeed wonderful to behold the blessings which my Spirit and my Mind have poured out upon you because of your faith . . .

Respectfully and sincerely, I am,
Rev. M. J. Divine, Ms.D., D.D.
(better known as Father Divine).'

> So much citation from a forty-eight page newspaper, all written to the same effect, [fn] will be enough to assure the reader that enthusiasm is not yet dead in countries where they understand salesmanship. In our own island, for the last century, revivalism has shown a law of diminishing returns; each new wave as it recedes, registers less of a high water mark. Moody and Sankey, Torrey-Alexander, Aimee Macpherson. And all these, it is unnecessary to add, were reimports from the United States of America.

Knox, R.A., "Enthusiasm: A Chapter in the History of Religion With Special Reference to the XVII and XVIII Centuries;" (Oxford: Clarendon Press 1950); *citing* "The New Day, Featuring the Works of Father Divine," No. XII, Saturday, 25 Sept., 1948 A.D.F.D. [sic].

Professor Knox continues in a more analytical vein:

> In its extreme form this theology has political repercussions. It justifies the doctrine of Wyclif, of Huss, of Lollardy, of Anabaptism, that dominion is founded on grace. To be born again makes you a new creature; the seed of grace, ransomed from a drowning world, must not be confused with the unregenerate;

> they are (so to say) a different kind of animal. They alone, and not the ungodly, have legal rights.

Id. at 584.

> More generally characteristic of ultrasupernaturalism is a distrust of our human thought processes. In matters of abstract theology, the discipline of the intellect is replaced by a blind act of faith. In matters of practical deliberation, some sentiment of inner conviction, or some external 'sign' indicative of the Divine will, claims priority over all considerations of common prudence.

Id. at 585.

> Still more confidently, the enthusiast dismisses all considerations of human prudence, and trusts to the light within him, when he must face the day-to-day problems of life. What dangerous results may flow from such an attitude we have considered already. But, even if these are left out of sight, it may be questioned whether this kind of illuminism is an enviable characteristic. That there should be a few people, close friends of God, who seem to live by instinct and by-pass calculation, is well enough; even the common run of us may experience, now and again, a flash of intuition which seemed akin to inspiration. But when a whole sect aspires to be spoon-fed with providential guidance, such as makes all deliberation, all effort of decision, henceforth unnecessary, there is ground for misgiving. Our mental powers also are from God; to write these off as hopelessly corrupted by the Fall is an extravagance quite unwarranted by the Christian tradition. To live by, and for, a series of supposedly Divine communications is, too commonly, to cultivate an unhealthy state of mind, avid of portents and ill protected from the inroads of superstition. What happens if the light is denied, or if two rival parties lay claim to rival inspirations? Your

> strict ultrasupernaturalist will not be at a loss for an answer: he casts lots.

Id. at 586-87.

Appellants contend that the conduct of this judge seriously violates their Due Process rights in a trial courtroom setting in which lay jurors are exhorted to "stick to the facts" and apply the law to those facts. Succinctly, it is difficult enough to get jurors in this day and age to engage in the rational analysis that is at the very heart of the civil legal system without the intrusion of the display in the 190th Judicial District Court. In that regard, the appellants made the following argument below: "Inasmuch as the display involved here intrudes upon the secular business of an actual courtroom, we must analyze the business of the courtroom in light of the display, especially the decidedly secular tasks to which prospective and actual jurors are sworn. To the panel in this case:

> In this case as in all cases, the actions of the judge, parties, witnesses, attorneys, and jurors must be according to the law. . . . I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial.

TEX. R. CIV. P. 226a. To the selected jurors:

> By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. . . . You will now receive written instructions which you will observe during this trial with such instructions which I may

> hereafter give, or as heretofore I have given to you. . . . You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings. . . . Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

Id. To the jurors on submission of the case:

> In the matters of law, you must be governed by the instructions in this charge. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. . . . . In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case. . . .

4. You should not decide who you think should win and then try to answer the questions accordingly.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance."

Id., cited in [Inst. 33, Appendix Tab 8], **Appendix E, pp. 36-38.**

Appellants contend that the role of jurors under the Texas Rules of Civil Procedure is secular, public, tightly controlled, and logical. "It is part of our settled jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes in order to put an *imprimatur* on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.'" *Texas*

Monthly, Inc. v. Bullock, 489 U.S. 1, 8-9 (1988)(citations omitted). It calls upon the jurors to leave aside any personal biases or prejudices, religious or otherwise, and participate in a disciplined intellectual exercise. Given these duties, the clear Establishment Clause violation in this courtroom, in the first instance, invites disobedience to jurors' oath. Next the display constitutes extraneous information that the jurors are sworn to ignore. Its content is, in some cases, contrary to some juror's religious beliefs, *e.g.*, the suppression of sympathy. Finally, the effect of the display if allowed to stand is unreviewable on appeal. Consequently, appellants contend that "an appropriate educational display that includes [Judge Devine's religious texts and icons] that would pass constitutional muster in the hallways of the Courthouse, as in *Harvey,* would not pass constitutional muster in an actual courtroom under the Due Process Clauses of the United States Constitution." **Appendix E, p. 38.** Appellants stand on that argument here.

Appellants do concede that the sentiments behind the appellee's conduct may be something true and something valuable.

> What men like Pascal, Fenelon, and Wesley saw clearly was something true and something valuable; the exaggerations, the eccentricities, were hatched by the heat of controversy. The sympathy which those names evoke is not the index of a rebel spirit in us, who read of them; it is not because they fell foul of authority and imperilled unity that we attribute to them greatness. It is not surprising if those who are most sensitive to the needs of their age find their way,

> sometimes, on to the wrong side of the calendar. Fine instruments are easily spoiled.

"Enthusiasm" at 590.

That notwithstanding, appellants nevertheless insist that this conduct and its effects is unreviewable on appeal and must be stopped at once.

Respectfully submitted,

DEREK H. DAVIS, PH.D., J.D.
N.D.Tex. I.D. No. 054749400
J. M. DAWSON INSTITUTE
BAYLOR UNIVERSITY
P.O. Box 97308
Waco, TX 76798-7308
254-710-1510
254-710-1571 Facsimile

COUNSEL FOR APPELLANT
MARIA TERESA MEDINA

Respectfully submitted,

DANIEL J. SHEA, S.T.B., J.D.
S.D.Tex. I.D. No. 12585
1001 Fannin, Suite 4660
Houston, TX 77002-6712
713-651-7800
713-652-9051Facsimile

PETER J. RIGA, TH.D., J.S.D.
S.D.Tex I.D. No. 6887
6420 Richmond Ave., Suite 220
Houston, TX 77057-5921
713-334-7111
713-334-0544 Facsimile

COUNSEL FOR APPELLANT
RAMON A. MEDINA, P.E.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAMON A. MEDINA, P.E., AND MARIA TERESA MEDINA, INDIVIDUALLY AND AS PARENTS OF LUIS-FRANCISCO EMANUEL MEDINA, Deceased, and CLASS OF SIMILARLY SITUATED PLAINTIFFS BEFORE THE 190TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS,	§	Entered: File Stamped April 4, 1997 Michael N. Milby U.S. Dist. Clerk
Plaintiffs	§	CIVIL ACTION No. H-96-2485
vs.	§	
HONORABLE JOHN P. DEVINE, Judge, 190th Judicial District Court of Harris County, Texas,	§	
Defendant	§	

MEMORANDUM AND ORDER OF DISMISSAL

Pending before the Court in the above referenced putative class action, seeking injunctive relief enjoining Defendant the Honorable John P. Devine and his successors from displaying in his courtroom and adjoining public areas allegedly religious pictures that violate the first amendment's separation of church and state doctrine and a litigant's right to due

process, are the following motions: (1) the Medina Plaintiffs' application for preliminary and permanent injunction and motion for summary judgment[1] (instrument #29); (2) Defendant's

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[1] The movant seeking a federal summary judgment initially must inform the court of the basis for its motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that it is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant need not negate the opposing party's claims nor produce evidence showing an absence of a genuine factual issue but may rely on the absence of evidence to support essential elements of opposing party's claims. International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987). The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R. Civ. P. 56(c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in his pleadings but must produce affirmative evidence and specific facts. Anderson, 477 U.S. at 256-57. He meets this burden only if he shows that "a reasonable jury could return a verdict for the non-moving party." Id. at 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. Id. at 252.

All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574. 587-88 (1986), citing United States v. Diebold, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the non-movant, he "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586. Instead he must produce evidence upon which a jury could reasonably base a verdict in his favor. Anderson, 477 U.S. at 249. "[There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id., 477 U.S. at 249-50. Unsubstantiated and subjective beliefs and opinions are

motion for additional time to file a response (#28); (3) Defendant's amended motion to dismiss (#34); and (4) Maria Teresa Medina's motion to file permissive intervention (#38).

Moreover, counsel for Plaintiffs, Daniel Shea, has improperly raised a number of issues by letter to the Court rather than by filing a motion and permitting Defendant a full and fair opportunity to respond. Specifically, in a letter dated March 20, 1997, Mr. Shea reurged his earlier motion that the undersigned judge recuse,[2] and in other missives he has raised issues concerning Judge Devine's order of recusal and its effect upon this case, submitted unauthenticated photographs, and made numerous factual allegations. The court admonishes counsel that any issues raised for ruling in this action must be done by motion in accordance with federal and local rules, with notice to and opportunity for the other side to respond.

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not competent summary judgment evidence. Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 115 S. Ct. 195 (1994); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S. Ct. 82 (1992).

[2] For the same reasons stated by the Court in its earlier order denying Mr. Shea's first motion to recuse, this Court sees no reason for recusal by the undersigned judge in this litigation.

The Court would also point out that Plaintiffs' first amended complaint is the controlling pleading here. As the Court pointed out in its memorandum and its order of October 4, 1996 (#14 and 15), the nature of Plaintiffs' claims changed substantially in the amended pleading. Thus much of Defendant's original motion to dismiss is moot. Moreover, because United States Magistrate Judge Frances Stacy has recused herself, this case has been returned to the undersigned Judge's docket.

Because no opposition has been filed to Defendant's motion for leave to enlarge time and because Defendant has filed a response, the Court grants the motion for leave (#28).

Citing United States v. FDIC, 881 F.2d 207 (5th Cir. 1989) as their authority, Plaintiffs' application for preliminary and permanent injunctions and notion for summary judgment argues that because Defendant's conduct violates the law, this Court "has no choice but to issue" an injunction without regard to the probable injury or public interest factors in the test for a preliminary injunction.[3] They assert that

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[3] A preliminary injunction is an extraordinary remedy. Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985). The decision

Defendant cannot

> impose his devotion on the taxpaying citizenry at large. He is a public servant, not a preacher, and his actions threaten the very foundation of what makes this nation the exemplar of democracy and respect for human dignity that it is. Neither may his motives and devotion hide the fact from the moment this defendant learned his actions were unconstitutional, he has engaged in a calculated campaign of delay, harassment, and masterly inactivity (footnotes omitted).

Plaintiffs submit as Exhibit A a certified copy of the Findings of Fact and Conclusions of Law of Texas State District Judge Andrew Z. Baker and argue that they are binding on this

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to grant or deny a preliminary injunction lies within the discretion of the district court. Apple Barrel Productions Inc. v. Beard, 730 F.2d 384, 386 (5th Cir. 1984); Lakedreams v. Taylor, 932 F.2d 1103, 1107 (5th Cir. 1991). In what Plaintiffs characterize as the Fifth Circuit's inapplicable "normal" four prong test to obtain a temporary restraining order or preliminary injunction, the moving party must demonstrate (1) a substantial likelihood of success on the merits, (2) a substantial threat that failure to grant the injunction will result in irreparable injury, (3) the threatened injury outweighs any damage that the injunction may cause the opposing party, and (4) the injunction will not disserve the public interest. See Mississippi Power, 760 F.2d at 621; Canal Authority v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974); Lakedreams, 932 F.2d at 1107. There can be no irreparable injury where money damages would adequately compensate a plaintiff. DWF Metro Line Services v. Southwestern Bell Telephone, 901 F.2d 1267, 1269 (5th Cir., cert. denied, 498 U.S. 985 (1990); Spiegel v. City of Houston, 636 F.2d 997, 1001 (5th Cir. 1981); Parks v. Dunlop, 517 F.2d 785, 787 (5th Cir. 1975).

court. They assert that "[v]iolations of the First Amendment and the loss of freedoms granted therein for even a minimal period of time constitutes an irreparable injury, which justifies the issuance of an immediate injunction . . . ." Deerfield Med. Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981).

Defendant responds that Plaintiffs' motion consists of conclusory allegations and disparaging comments about Defendant and fails to carry the burden of a successful summary judgment or application for injunction. Contrary to Plaintiffs' representation, United States v. FDIC , 882 F. 2d 207, does not stand for the proposition that the normal four-prong test for injunctive relief does not apply and an injunction is mandatory because Defendant allegedly violated the law. Recognizing the established Four-prong test in its analysis of violations of 12 U.S.C. § 91, id. at 210, that court held that "if a statutory violation is involved and the statute by necessary and inescapable inference requires injunctive relief, the movant is not required to prove the injury and public interest factors." Never-

theless, Defendant contends, Plaintiffs have failed to demonstrate how this case is analogous to the facts of that case, which dealt with violation of a specific statute, nor how the remaining two prongs of the test are satisfied. Indeed, they contend that Plaintiffs cannot demonstrate a likelihood of success on the merits or irreparable harm because Defendant may be removed from the case; moreover Defendant emphasizes that Plaintiffs have filed a second motion to recuse Judge Devine that, if granted, will result in the instant action's becoming moot. As for the findings and conclusions of Judge Baker of the 190th Judicial District Court following a hearing on Plaintiffs' motion to recuse Judge Devine, as well as a motion to quash a subpoena issued by Plaintiffs to obtain Judge Devine's testimony at the hearing, Judge Baker denied both motions. Moreover, Judge Baker identified as the concern of the hearing whether Judge Devine could be a fair and impartial judge in Plaintiffs' state court wrongful death suit and not whether Judge Devine's courtroom decor violated the Constitution. Only in dicta did Judge Baker note that he found the decor did violate the first amendment. Defen-

dant represents that the Findings of Fact and Conclusions of Law were drafted by Plaintiffs and submitted for Judge Baker's signature. Judge Baker made only minor changes before signing the instrument. That order by Judge Baker, argues Defendant, is interlocutory, not final, and is currently being challenged by a motion to set aside or withdraw filed by Judge Devine. Thus it is inadequate as summary judgment evidence.

After reviewing the record and the applicable law, the Court concludes that Plaintiffs' application for injunction and motion for summary judgment should be denied. Plaintiffs have made conclusory and simplistic statements about a complex area of law that is anything but black and white and have failed to convince the Court that they are likely to succeed an the merits. If the documents submitted by Mr. Shea with his letters, which the Court reiterates are not part of the official record, are correct, Judge Devine has recused himself. Even if he had not, Plaintiffs have failed to brief and argue the complex issues on which they bear the burdens of proof and persuasion at trial.

To be more specific, this Court notes that

in contrast to a once bright-line wall of separation between church and state,[4] United States Supreme Court decisions over the past forty or more years place a growing emphasis upon accommodation between government and religion within the ambit of a required policy of neutrality toward different religions, as a means of resolving tension between the free exercise and establishment clauses of the first amendment. Justice Douglas declared forty-five years ago,

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for a wide variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious

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[4] In recent decades the Supreme Court referred to that wall of separation between church and state as a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

> nature of our spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952). We have long been used to "such government acknowledgment of religion as legislative prayers . . . . government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable Court. Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions expressing confidence in the future and encouraging recognition of what is worthy of appreciation in society." Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

Plaintiffs have failed to apply the Lemon test, standardly used by the United States Supreme Court to determine whether a practice violates the establishment clause. Lemon v. Kurtzman, 403 U.S. at 612-13 (to avoid an establishment clause issue the court must find that

the challenged practice (1) has a secular purpose, (2) with a principal effect of neither advancing nor inhibiting religion, and (3) not fostering an excessive entanglement of the state with religion). Furthermore the Supreme Court has negated a per se or absolutist application of Lemon to establishment clause questions. Lynch v. Donnelly, 465 U.S. at 678. The Court has defined as an "absolutist" approach one "mechanically, invalidating all governmental conduct or statutes that confer benefits or give recognition to religion in general. Id. at 679. To the second prong of the Lynch test has since been added the disapproval of governmental practices that appear to endorse religion. Allegheny v. American Civil Liberties Union, 492 U.S. 573, 594(1989)(menorah next to a Christmas tree in a large holiday season display did not violate the establishment clause)(citing Justice O'Connor's concurring discussion in Lynch, 465 U.S. at 692).

Moreover, Plaintiff has failed to address numerous Supreme Court cases that have found no establishment clause violations where there have been religious displays. See, e.g., Lynch v. Donnelly, 465 U.S. 668 (rejecting establishment

clause challenge to a creche set up on public property at Christmas); Marsh v. Chambers, 463 U.S. 783 (1983)(sustaining Nebraska' practice of opening its state legislature with daily prayer led by a chaplain paid from public funds). See also Jones v. Clear Creek I.S.D., 977 F.2d 963, 972 (1992)(holding that a resolution permitting invocation and benediction at public high school graduation for secular purpose of solemnization was unlikely to advance religion and did not violate the establishment clause), cert. denied, 113 S. Ct. 2950 (1993).

For these reasons, the Court concludes that Plaintiffs have failed to meet their burdens for either summary judgment and preliminary injunction.

Defendant's amended motion to dismiss states that he transferred the wrongful death suit from his state court docket on January 31, 1997 for two reasons: (1) Plaintiffs filed a grievance, which he views as a personal attack, against him with the Judicial Conduct Commission and (2) because of a long line of recusal motions filed by Plaintiffs' counsel, Plaintiffs' case was stalled. Defendant maintains that the federal action has become

moot and should be dismissed.[5] Moreover, Plaintiffs lack standing because they, have no injury that the Court can redress. Since Defendant has transferred Plaintiffs' wrongful death suit and Plaintiffs are no longer threatened with an alleged injury, the case should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs have failed to present factual evidence that they have been injured or that a present adversarial relationship exists between them and Judge Devine. Nor have they shown how Judge Devine has violated their Constitutional rights.

Plaintiffs argue that because the issue of recusal by Judge Devine has yet to be heard by an assigned judge, this action is not moot. Plaintiffs argue that Judge Devine's voluntary cessation of illegal activity does not deprive this court of jurisdiction since such activity may recur and because the class action still remains. They insist that they have stated a viable first amendment claim.

Judge Devine responds with a copy of a document from the administrative judge of the

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[5] Defendant notes that no class has been certified. The Court observes further that Plaintiffs have not even filed a motion for class certification.

Civil Trial Division of Harris County District Courts reassigning Plaintiffs' wrongful death suit to another judge. Because the case is no longer before Judge Devine and will not be adjudicated in his courtroom, this case is moot and Plaintiffs lack standing to bring the instant action.

Although Mr. Shea's subsequent letters and their attachments are not part of the official record of this case, it is clear that there is no dispute that Plaintiffs' wrongful death suit is no longer pending before Judge Devine. Therefore the Court addresses the question of mootness.

A well recognized exception to the mootness doctrine is applicable when a certain harm is capable of repetition yet evades review. Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). Although a case may be technically moot, a federal court may nevertheless retain jurisdiction if a continuing controversy exists or if the challenged problem is likely to recur or is otherwise capable of repetition. Vieux Carre Property Owners, Residents, and Associates, Inc., 948 F.2d 1436, 1447 (5th Cir. 1991), citing Southern Pacific Terminal Co. v. ICC, 219

U.S. 498, 515 (1911). The repetition prong of the exception requires that there be some possibility that the challenged conduct will be repeated and will affect the plaintiff. Id., citing Floyd v. Bowen, 833 F.2d 529, 531 n.2 (5th Cir. 1987) and Pierce v. Winograd, 755 F.2d 714, 715 5th Cir. 1985). The evading review prong requires that the of harm be of limited duration so that it is likely to ne moot before litigation is completed. Id., citing Murphy v. Hunt, 455 U.S. 478, 482(1981)("there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party").[6] This Court finds that there is no reasonable expectation that the Medina Plaintiffs would file another suit that would be assigned to Judge Devine and be tried in his courtroom. Therefore the Court finds that this case is moot and should be dismissed.

Accordingly, the Court

ORDERS that Defendant's motion for leave to enlarge time to respond the motion for injunctive relief and summary judgment is

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[6] The Murphy court cites Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

granted. The Court further

ORDERS that Plaintiffs' application for in-junction and motion for summary judgment is DENIED. Finally, the Court

ORDERS that this case is DISMISSED on mootness grounds. Maria Teresa Medina's motion for permissive intervention is moot.

SIGNED at Houston, Texas, this 2nd day of April, 1997.

/s/ MELINDA HARMON
UNITED STATES DISTRICT JUDGE

NO. 94-48707

RAMON A. MEDINA, P.E. MARIA TERESA MEDINA, Individually and as Parents of LUIS-FRANCISCO EMMANUEL MEDINA, Deceased, Plaintiffs,	§	IN THE DISTRICT COURT OF
	§	HARRIS COUNTY, TEXAS
vs.	§	
D. J. CLARK, INC., Individually and d/b/a DOUBLE ARCHES CORPORATION, and McDONALD'S CORPORATION, Defendants.	§	190TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a motion to recuse the duly elected judge of the 190th Judicial District Court of Harris County, Texas. Plaintiffs filed this motion asserting, *inter alia*, violations of the Establishment Clause of the First Amendment to the United States Constitution. After a hearing and receiving evidence, the Court makes the following findings and conclusions.

FINDINGS OF FACT

1. John Devine is the duly elected Judge of the 190th Judicial District Court of Harris County, Texas.

2. Based on the Court's personal inspection, Judge Devine has adorned the walls of his courtroom with various and sundry biblical texts and a rendition of the Ten Commandments on two tablets, as set forth specifically in plaintiffs' motion.

~~3. Judge Devine has refused all requests by Plaintiffs to remove the aforesaid objects complained of.~~ /i/ A.Z.B.

4. The Court took judicial notice that all the ornaments complained of are religious in nature.

~~5. Judge Devine has stated publicly, as reported in the press, that the artifacts in question are his and he has no intention of taking them down~~ /i/ A.Z.B.

6. Judge Devine testified ~~under oath~~ that he is employed as a State District Judge of the 190th District Court and that he is paid by the State of Texas and Harris County. /i/ A.Z.B.

7. Judge Devine's courtroom is a public place supported by taxpayer funds.

8. Judge Devine is an elected public servant.

9. Judge Devine testified ~~under oath~~ that he would follow all laws as mandated by the Supreme Court of the United States of America. /i/ A.Z.B.

CONCLUSIONS OF LAW

1. The exhibition of the ornaments complained of in the courtroom of the 190th Judicial District Court of Harris County, Texas is offensive to the Establishment Clause of the First Amendment to the United States Constitution and is a violation of the Establishment Clause of the First Amendment to the United States Constitution (USCA)., *in the opinion of the trial judge.*

2. The First Amendment to the United States Constitution

has not been repealed.

3. Judge Devine is bound by Article VI, Sec. 2 USCA as are all judges of this State.

4. Article III USCA dictates that the judicial authority of the United States shall be vested in one (1) Supreme Court, and that all other courts below it are inferior.

5. Rule 18 of the Texas Rules of Civil Procedure does not reach this type of conduct and the recusal statute addresses personal biases and prejudices only.

6. Plaintiffs have an adequate remedy to address these violations and Rule 18 of the Texas Rules of Civil Procedure is not the vehicle by which to do it.

7. This Court cannot dictate to the parties what their remedies are as that would be a violation of the Texas Code of Judicial Conduct.

8. Judge Devine demonstrated no bias against the Medinas.

9. Unless such bias is demonstrated, or plaintiffs can show that Judge Devine misrepresented his testimony, the Court must deny the Motion to Recuse.

10. Any finding of fact which may be deemed a conclusion of law is hereby adopted as such, and any conclusion of law which may be deemed a finding of fact is hereby adopted as such.

SIGNED this 6th day of November 1996 at Galveston County,

Texas.

/s/ Andrew Z. Baker
ANDREW Z. BAKER
Sitting by Assignment pursuant to
Tex. Govt. Code § 74.053[1]

PREPARED AND ENTRY
REQUESTED BY:

DANIEL J. SHEA. P.C.

By: /s/ Daniel Shea
Daniel J. Shea
State Bar No. 18163850
1001 Fannin, Suite 4660
Houston, TX 77002-6712
(713) 651-7800
(713) 652-9051

ATTORNEY FOR PLAINTIFFS

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[1] The order of assignment states that it is made under Rule 18. Rule 18, a rule of civil procedure, cannot confer jurisdiction on a court. Jurisdiction can only be conferred by the Texas Constitution or by statute. *See Mercer v. Driver*, 923 S.W.2d 656, 658 (Tex. App.--Houston [1st Dist.] 1995, orig. proceeding)(dictating that all assignments of visiting judges are under the Texas Government Code unless the judge is elected, which is covered by the Texas Constitution).

NO. 94-48707

RAMON A. MEDINA, P.E. MARIA TERESA MEDINA, Individually and as Parents of LUIS-FRANCISCO EMMANUEL MEDINA, Deceased, Plaintiffs,	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
vs.	§	
D. J. CLARK, INC., Individually and d/b/a DOUBLE ARCHES CORPORATION, and McDONALD'S CORPORATION, Defendants.	§	190TH JUDICIAL DISTRICT

~~AFFIDAVIT~~ *Statement* OF HON. ANDREW Z. BAKER,

SENIOR JUDGE 309TH DISTRICT COURT

OF GALVESTON COUNTY, TEXAS /i/ A.Z.B.

THE STATE OF TEXAS §
§
COUNTY OF GALVESTON §

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day did personally appear HON. ANDREW Z. BAKER, known to me to be the person whose signature appears below and who, being by me duly sworn, did depose as follows:

"My name is Andrew Z. Baker. I am over the age of eighteen years, mentally competent, and otherwise qualified to make an affidavit. I have firsthand knowledge of the facts hereinafter set forth.

"I am the Senior Judge of the 309 Judicial District Court of

Galveston County, Texas, qualified for assignment under Chapter 74 of the Texas Government Code.

"On or about November 18, 1996, a date after which I had been assigned in the above captioned case, I received a *Motion to Set Aside or Withdraw Findings of Fact and Conclusions of Law, In Whole or in Part*, filed by the trial judge, the Honorable John P. Devine of the 190th District Court. The motion was not filed by a party to the suit. That motion was addressed to me personally, i.e., 'TO THE HONORABLE ANDREW Z. BAKER,' from, 'COMES NOW The Honorable John P. Devine.' Upon review of the motion and its response, I allowed the motion to be overruled by operation of law.

"I stand by my findings, as corrected where initialed, and signed."

FURTHER AFFIANT SAITH NOT.

/S/ Andrew Z. Baker
ANDREW Z. BAKER

SUBSCRIBED AND SWORN TO on this ____th day of _____, 19___ in Galveston County, Texas to certify which witness below my hand and seal of office.

"No need to notarize District Judge's signature." /i/ A.Z.B.

CLOSED APPEAL

U.S. District Court
TXS - Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE # 96-CV-2485

Medina, et al v. Devine, et al Filed: 08/05/96
Assigned to: Judge Melinda Harmon
Demand: $0,000
Lead Docket: None
Dkt # in other court: None
Nature of Suit: 440
Jurisdiction: Federal Question

Cause: 42:1983 Civil Rights Act

RAMON A. MEDINA, P.E., Individually and as Parent of Luis Francisco Emanuel Medina, Deceased plaintiff	Daniel Joseph Shea 713-652-9051 [COR LD NTC] Attorney at Law 1001 Fannin Ste 4660 Houston, TX 77002-6712
MARIA TERESA MEDINA Individually and as parent of Luis-Francisco Emanuel Medina, Deceased plaintiff	Daniel Joseph Shea (See above) [COR LD NTC]
v.	
JOHN P. DEVINE, Honorable defendant	Richard C Geisler, Jr. 512-320-0667 fax [COR LD NTC] Office of Atty. Gen. P.O. Box 12548 Austin, TX 78711-2548 512-463-2120

INTERNAL USE ONLY: Proceedings include all events. 4:96cv2485 Medina et al v. Devine et al. CLOSED APPEAL

HOUSTON FEDERATION OF TEACHERS movant	Daniel Joseph Shea 713-652-9051 [COR LD NTC] Attorney at Law 1001 Fannin Ste 4660 Houston, TX 77002- 713-651-7800
TRUE COPY I CERTIFY ATTEST: MICHAEL N. MILBY, Clerk /s/ B. Wright Deputy Clerk	
ANDY DEWEY movant	Daniel Joseph Shea (See above) [COR LD NTC]
CAROLYN WAGNER movant	Daniel Joseph Shea (See above) [COR LD NTC]

SHAROLYN WOOD
defendant

[Page numbering not repeated]
[CLOSED APPEAL Not repeated]

RAMON A. MEDINA, Individually and as Parent of Luis-Francisco Emanuel Medina, Deceased; MARIA TERESA MEDINA, Individually and as parent Of Luis-Francisco Emmanuel Medina Deceased
plaintiff

v.

JOHN P DEVINE, Honorable
defendant

HOUSTON FEDERATION OF TEACHERS; ANDY DEWEY; CAROLYN WAGNER
movant

SHAROLYN WOOD
defendant

INTERNAL USE ONLY: Proceedings include all events 4:96cv2485 Medina, et al v. Devine et al
CLOSED APPEAL

8/5/96	1	COMPLAINT filed; FILING FEE $ 120 RECEIPT # 459110 (ad) [Entry date 08/06/96]
8/5/96	2	ORDER set scheduling conference for 9:00 10/22/96 before Magistrate Judge Frances H. Stacy, entered; Parties notified. (Signed by Judge Melinda Harmon) (ad) [Entry date 08/06/96] sl
8/6/96	3	ORDER, denying [1-1] complaint/motion for injunctive relief. entered; Parties notified. (signed by Judge Melinda Harmon) (fs) [Entry date 08/07/96]
8/12/96	4	MOTION to disqualify Hon. Melinda Harmon, U S District Judge by Ramon A Medina, Maria Teresa Medina Motion Docket Date 9/1/96 [4-1] motion, filed. (fs) [Entry date 08/14/96]
8/12/96	5	WAIVER OF SERVICE Returned Executed as to John P Devine 8/8/96, filed. (fs) [Entry date 08/14/96]

8/27/96	6	28 USC 144 MOTION to recuse Hon. Melinda Harmon, U S District Judge by Ramon A Medina Motion Docket Date 9/16,/96 16-11 motion, filed. (fs) [Entry date 08/29/96]
8/27/96	7	AFFIDAVIT by Ramon A Medina filed (fs)[Entry date 08/29/96]
8/30/96	8	FIRST AMENDED COMPLAINT by Ramon A Medina, Maria Teresa Medina, filed. (fs) [Entry date 09/03/96]
9/3/96	9	MOTION to clarify by Judge John P Devine Motion Docket Date 9/23/96 [9-1] motion, filed. (fs)[Entry date 09/04/96]
9/3/96	-	**Added for John P Devine attorney R Chad Geisler (fs) [Entry date 09/06/96]
1/6/96	10	Deft's MOTION for R. Chad Geisler to appear pro hac vice by John P Devine, Motion Docket Date 9/26/96 [10-1] motion, filed. (fs) [Entry date 09/09/96]
9/9/96	11	RESPONSE by John P Devine to pltfs' [6-1] motion to recuse Hon. Melinda Harmon, U S District Judge filed. (fs)[Entry date 09/10/96]
9/2096	25	ORDER granting [10-1] motion for R. Chad Geisler to appear pro hac vice for deft Devine., entered; Parties notified. (Signed by Judge Melinda Harmon) (fs) [Entry date 12/03/96]
10/4/96	12	MOTION to dismiss by John P Devine, Motion Docket Date 10/24/-96 [12-1] motion, filed. (hl) [Entry date 10/07/96]

10/4/96 13 MEMORANDUM AND ORDER denying Pltfs [6-1] motion to recuse Judge Melinda Harmon and denying Pltfs [4-1] motion to disqualify Judge Melinda Harmon, entered. Parties notified. (signed by Judge Melinda Harmon) (ph)[Entry date 10/08/96]

10/4/96 14 MEMORANDUM, entered. Parties notified. Pltfs first amended com plaint operates as a removal of the Original Complaint. Pltfs now have a viable complaint to which Judge Devine should file an answer or otherwise respond. (signed by Judge Melinda Harmon) (ph) [Entry date 10/08/96]

10/4/96 15 ORDER granting Defts [9-1] motion to clarify, entered; Parties notified. Deft Judge Devine may need additional time to answer or otherwise respond to Pltfs First Amended Complaint. If this is the case, deft Judge Devine may have an additional 30 days from the date of the entry of this order. (signed by Judge Melinda Harmon) (ph) [Fntry date 10/08/96]

10/22/96 16 Minutes of Scheduling Conference: Tape Number: 102296FHS1702 App: Greer f/deft, Shea f/pltf. Conference reset to allow parties to conduct Rule 26(f) meeting and file joint discovery & case management plan. (fs)[Entry date 10/24/96]

10/22/96 - **Terminated deadlines (fs) [Entry date 10/24/96]

10/22/96 17 MEMORANDUM AND ORDER: Counsel for

pltf appeared in person. Counsel for deft appeared by telephone. As the parties have not yet conducted a Fed.R.Civ.P. 26(f) meeting and have not filed a Joint Discovery and Case Management Plan, the Rule Scheduling conference is RESET: reset scheduling conference for 9:00 11/5/96. No later than 10/31/96, the parties shall conduct a Rule 26(f) meeting and file a Joint Discovery and Case Management Plan; set case management plan due 10/31/96. Deft's [10-1] motion for R. Chad Geisler to appear pro hac vice is GRANTED with the proviso that deft's counsel, Mr. Geisler, immediately take all steps necessary for the admission to practice before a federal court in this state. entered. Parties notified. signed by Magistrate Judge Frances H. Stacy)(fs)[Entry date 10/24/96]

10/23/96 18 TRANSCRIPT OF PROCEEDINGS of telephonic scheduling conference for dates of 10/22/96 before Judge Frances H. Stacy , filed. (Court Rptr: none present) (fs)[Entry date 10/25/96]

10/30/96 19 Joint Report of Meeting and Joint Discovery/Case Management Plan:by John P Devine, Maria Teresa Medina, Ramon A Medina, filed. (fs) [Entry date 10/31/96]

11/4/96 20 Minute Entry Order: CONFERENCE held on 11/4/96. Apps: Geisler f/deft; Shea f/pltfs. Parties consented to trial before Magistrate Stacy. Scheduling order entered. Terminated deadlines,

entered. Parties ntfd. (Signed by Magistrate Judge Frances H. Stacy) (ph) [Entry date 11/07/96]

11/4/96 21 SCHEDULING ORDER setting Joining of parties, amending of pleadings 1/31/97; Expert witness list submitted by 4/1/97 for pltf; 5/1/97 for deft; Discovery cutoff 6/20-/97; Deadline for filing all dispositive motions 7/1/97; Deadline for filing non-dispositive motions 7/1/97; Pretrial order to be submitted on or before 8/18/97; Trial date deadline 9:30 8/25/97, entered. Parties notified. (Signed by Magistrate Judge Frances H. Stacy)(ph)[Entry date 11/07/96]

11/?/96 22 Scheduling conference held before Magistrate Judge Frances H. Stacy Ct Reporter: ERO. Appearances by: Chad Giesler and Daniel Shea. Scheduling order entered. (mt) [Entry date 11/08/96]

11/13/96 23 CONSENT to trial by Magistrate by John P Devine, Maria Teresa Medina, Ramon A Medina and ORDER REFERRING CASE (Signed by Judge Melinda Harmon) to Magistrate Judge Frances H. Stacy, entered. Parties ntfd. (nd) [Entry date 11/14/96]

11/14/96 24 DEFT'S MOTION to Reurge Motion Docket Date 12/4/96 [12-1] motion to dismiss by John P Devine, filed. (dak) [Entry date 11/18/96]

12/6/96 26 Application/MOTION for preliminary injunction, for permanent injunction, and for summary judgment by Maria Teresa Medina, Ramon A Me-

dina, Motion Docket Date 12/26/96 [26-1] motion, 12/26/96 [26-2] motion, 12/2/96 [2G-3] motion, filed. (fs) [Entry date 12/09/96]

1/8/97 27 ORDER Motion hearing set for 10:00 1/23/97 for [2G-1] motion for preliminary injunction, set for 10:00 1/23/97 for [2G-2] motion for permanent injunction, set for 10:00 1/27/97 for [26-3] motion for summary judgment, entered; Parties notified. (signed by Magistrate Judge Frances H. Stacy)(fs) [Entry date 01/10/97]

1/10/97 28 MOTION for leave for additional time to file a response to pltfs application for preliminary and permanent injunction and motion for summary judgment by John P Devine, Motion Docket Date 1/30/97 [28-1] motion, filed. (ps) [Entry date 01/14/97]

1/13/97 29 Deft's RESPONSE by John P Devine to pltfs' [26-1] motion for preliminary injunction, [26-2] motion for permanent injunction, [26-3] motion for summary judgment, filed. (fs) Docket as of June 26, 1997 10:30 am [Entry date 01/15/97]

1/21/97 30 ORDER Motion hearing reset for 10:00 1/27/97 for [2G-1] motion for preliminary injunction, reset for 10:00 1/27/97 for [26-2] motion for permanent injunction, reset for 10:00 1/xx/97 for [2G-3] motion for summary judgment, entered; Parties notified. (Signed by Magistrate Judge Frances R. Stacy) (ym) [Entry date

01/29/97]

1/27/97 31 PLTFS' MEMORANDUM in support of an exception to the anti-injunction act and to the doctrines of abstention, exhaustion of remedies, and jurisdiction by Ramon A Medina, Maria Teresa Medina, filed. (dak) [Entry date 01/29/97]

1/27/97 32 PLTFS' REBUTTAL by Ramon A Medina, Maria Teresa Medina to deft's response to pltfs' [26-1] motion for preliminary injunction, [26-2] motion for permanent injunction, [26-3] motion for summary judgment, filed. (dak) [Entry date 01/30/97]

1/31/97 33 SUPPLEMENTAL MEMORANDUM by Pltfs Maria Teresa Medina, Ramon A Medina in support of [26-1] motion for preliminary injunction, [26-2] motion for permanent injunctions, for attorney's fees and [26-3] motion for summary judgment, filed (ks) [Entry date 02/03/97]

2/3/97 34 Defts MEMORANDUM OF LAW by John P Devine, filed.(document includes "amended motion ... 11) (fs)[Entry date 02/05/97]

2/3/97 34 AMENDED MOTION to dismiss by John P Devine, Motion Docket Date 2/23/97 [34-1] motion, filed. (fs) [Entry date 02/05/97]

2/3/97 35 Letter from atty Daniel J. Shea to Magistrate Judge Stacy, w/brown envelope with pictures, filed (fs) [Entry date 02/06/97]

2/5/97 36 Pltfs REPLY to deft John Devine's

34-1] memorandum of law and [34-1]amended motion to dismiss by Ramon A Medina, Maria Teresa Meina, filed. (fs) [Entry date 02/10/97]

2/10/97 37 Deft' REPLY by John P Devine to pltfs response to deft's memorandum of law and [34-1]amended motion to dismiss filed (fs) [Entry date 02/12/97]

3/14/97 38 MOTION for leave to file permissive intervention by Maria Teresa Medina, Ramon A Medina, Motion Docket Date 4/3/97 [38-1] motion, filed. (hl) [Entry date 03/18/97]

3/19/97 39 ORDER OF RECUSAL, entered; Parties notified. signed by Magistrate Judge Frances H. Stacy)(hl)

3/19/97 - CASE: reassigned to Judge Melinda Harmon (hl) [Entry date 04/10/97]

3/20/97 40 Letter MOTION for reconsideration of [39-1] order by Daniel J Shea, attorney for Ramon A Medina, Maria Teresa Medina, Motion Docket Date 4/9/97 [40-1] motion, filed (dak) [Entry date 03/21/97]

3/20/97 41 DEFT'S RESPONSE by John P Devine in opposition to intervenors' [38-1] motion for leave to file permissive intervention and for intervention, filed. (dak) [Entry date 03/21/97]

3/21/97 42 Letter to Judge Harmon, re: state court rulings, by atty Daniel J. Shea, counsel for pltfs Ramon A Medina, Maria Teresa Medina, filed (fs)[Entry date 03/25/97]

3/26/97 - **Terminated deadlines (fs)

3/31/97 43 MOTION for leave to file intervention of right by Houston Fed Teachers, Andy Dewey, Carolyn Wagner, Motion Docket Date 4/20/97 [43-1] motion, filed. (fs) [Entry date 04/01/97]

4/2/97 44 MEMORANDUM AND ORDER OF DISMISSAL granting Defts [28-1] motion for leave for additional time to file a response to pltfs application for preliminary and permanent injunction and motion for summary judgment; denying Pltfs [26-1] motion for preliminary injunction; [26-2] motion for permanent injunction; [26-3] motion for summary judgment; granting [34-1] motion to dismiss; granting [12-1] motion to dismiss, entered. Parties notified. This case is DISMISSED on mootness grounds. Maria Teresa Medina' motion for permissive intervention is moot. (signed by Judge Melinda Harmon) (ps) [Entry date 04/04/97]

4/2/97 - case closed (ps) [Entry date 04/04/97]

4/4/97 45 PLTF'S SECOND AMENDED COMPLAINT by Ramon A Medina, Maria Teresa Medina, (Answer due 4/14/97 for John P Devine) amending [8-1] amended complaint adding Sharolyn Wood, filed. (dak) [Entry date 04/09/97]

4/4/97 46 PLTFS' and INTERVENORS' MOTION for hearing on class certification, leave for Rule 19 joinder, disqualification, intervention of right, leave to file amended com-

plaint, or, in the alternative, Rule 59(e) motion to alter or amend judgment by Ramon A Medina, Maria Teresa Medina, Houston Fed Teachers, Motion Docket Date 4/24/97 [46-1] motion, filed. (dak) [Entry date 04/09/97]

4/4/97 50 Deft's RESPONSE by John P Devine in opposition to Intervenors [43-1] motion for leave to file intervention of right, filed (fs) [Entry date 04/11/97]

4/7/97 47 NOTICE OF APPEAL of [44-1] order and Designation of Record by Maria Teresa Medina, Ramon A Medina, — filed. Fee Status: Pd Receipt #: 466294 (bw) [Entry date 04/10/97] [Edit date 04/10/97]

4/8/97 48 SUPPLEMENTAL EXHIBIT "8" to Pltfs' and Intervenors, [46-1] mo-tion for hearing on class certification, leave for Rule 19 joinder, disqualification, intervention of right, leave to file amended complaint, or, in the alternative, Rule 59(e) motion to alter or amend judgment by Ramon A Medina, Maria Teresa Medina, filed. (ts) [Entry date 04/10/97]

4/8/97 49 AMENDED NOTICE OF APPEAL of [44-1] order by Maria Teresa Medina, Ramon A Medina, filed. (bw) [Entry date 04/10/97] [Edit date 04/11/97]

4/9/97 51 Second Amended NOTICE OF APPEAL of [44-1] order by Maria Teresa Medina, Ramon A Medina, filed. (bw) [Entry date 04/11/97]

4/10/97 - Notice of appeal and certified

4/10/97	-	Notice of appeal and certified copy of docket transmitted to USCA [47-1] appeal (bw)
4/10/97		**Address labels only (bw)
4/10/97		Notice of appeal and certified copy of docket transmitted to USCA: [49-1] appeal (bw)
4/11/97		Notice of appeal and certified copy of docket transmitted to USCA: [51-1] appeal (bw)
4/11/97	52	RESPONSE by John P Devine in opposition to pltfs' and intervenors' [46-1] motion for hearing on class certification, leave for Rule 19 joinder, disqualification, intervention of right, leave to file amended complaint, or, in the alternative, Rule 59(e) motion to alter or amend judgment , filed (fs) [Entry date 04/15/97]
4/14/97	53	Transcript request; [47-1] appeal; motion for s.j. hearing on 1/27/97; ct Reporter: not given., filed. (fs) [Entry date 04/15/97]
4/18/97	-	**Terminated document [46-1] motion for hearing on Class certification, leave for Rule 19 joinder, disqualification, leave to file amended complaint, or, intervention of right, in the alternative, Rule 59(e) motion to alter or amend judgment. MOOT, case closed. (dak)
4/29/97	-	USCA appeal fees received $105.00 Receipt #: 466959 [49-1] appeal Parties ntfd. (bw) [Entry date 05/02/97]

4/29/97	54	pltf's Strike of Their Second Amended Notice of Appeal to the United States Court of Appeals for the Fifth Circuit.(bw) [Entry date 05/02/97]
4/30/97		NOTICE of Docketing NOA from USCA Re: [49-1] appeal USCA NUMBER: 97-20369 (bw)
5/1/97		NOTICE of Docketing NOA from USCA Re: [51-1] appeal USCA NUMBER: 97-20369 (bw)
5/1/97		NOTICE of Docketing NOA from USCA Re: [49-1] appeal USCA NUMBER: 97-20369 (bw)
5/2/97		**Address labels only (bw)
5/15/97	55	TRANSCRIPT OF PROCEEDINGS of MOTION FOR SUMMARY JUDGMENT HEARING for dates of 1/27/97 before Judge Frances H Stacy, filed, (Court Rptr: none present) (lt) [Entry date 05/21/97]
5/21/97	56	ORDER denying [38-1] motion for leave to file permissive intervention; denying pltfs' and intervenors' [46-1] motion for hear-ing on class certification, leave for Rule 19 joinder, disqualification, intervention of right, leave to file amended complaint, or, in the alternative, Rule 59(e) motion to alter or amend judgment, entered; Parties notified. (Signed by Judge Melinda Harmon) (1) [Entry date 05/23/97]
6/5/97	57	ORDER , entered; Parties notified. Pltfs second amended notice of appeal is STRICKEN. (signed by Judge

Melinda Harmon)(ps) [Entry date 06/06/97]

6/20/97 58 Pltfs' SECOND MOTION for leave to file amended complaint by Maria Teresa Medina, Ramon A Medina, Motion Docket Date 7 10/97 [58-1] motion, filed. (fs) [Entry date 06/23/97]

6/20/97 59 Pltfs' THIRD AMENDED COMPLAINT by Maria Teresa Medina, Ramon A Medina, amending [8-1] amended complaint filed. (fs)[Entry date 06/23/97] [Edit date 06/23/97]

6/24/97 60 ORDER denying Pltfs' Second [58-1] motion for leave to file amended complaint, entered; Parties notified (signed by Judge Melinda Harmon) (ps) [Entry date 06/25/97]

6/26/97 - Certificate of Readiness issued to 5th Circuit Court of Appeals. USCA NUMBER: 97-20369. Parties ntfd. (bw)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAMON A. MEDINA, P.E., MARIA TERESA MEDINA, Individually and as Parents of LUIS-FRANCISCO EMMANUEL MEDINA, Deceased, and CLASS OF SIMILARLY SITUATED PLAINTIFFS BEFORE THE 190TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS, Plaintiffs,	§	CIVIL ACTION NO. H-962485
vs.	§	
HON. JOHN P. DEVINE, Judge, 190th Judicial District Court of Harris County, Texas, Defendant.	§	

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTIONS, FOR ATTORNEY'S FEES, AND MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs file this supplemental memorandum pursuant to the hearing on this matter held before this Court on January 27, 1997. Since the facts of this case are, in part, of first impression, plaintiffs address the merits without reliance on the conclusions of law of Hon.

Andrew Z. Baker.[1] Plaintiffs also submit evidence of attorney's fees pursuant to the Court's specific instructions.

I. THE DOCTRINE OF SEPARATION OF CHURCH AND STATE

A. Methodology: The Historical-Critical Method

Plaintiffs will use the historical-critical method of analysis to set forth the church-state issues that arise in this case. In support of this methodology, plaintiffs rely on the historical method used by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113. 129-147 (1972).[2]

B. Church State Separation--A Historical Analysis: From Rome to Reformation

The great English historian, Lord Acton, writing in the 19th century, had this to say about the genesis of the phenomenon of the intertwining of the church and state.

> According to Justinian, the Roman people had formally transferred to the emperors the entire

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[1] Most of the documentary material on which plaintiff will rely was judicially noted by this Court at the January 27 hearing. In addition, counsel for the defendant admitted on the record that there is no factual controversy on the presence of the articles in the 190th at all relevant times.

[2] While plaintiffs rely on the *Roe v. Wade* methodology, they disagree with both its completeness and conclusions. Specifically, the *Roe* Court relies heavily on the pseudo-scientific distinction of St. Thomas Aquinas (*embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*) without understanding that the 13th century Europe of St. Thomas was almost completely devoid of scientific knowledge. When the first university was founded in Bologna, ca. 1180, the West was counting on its fingers and toes using Roman numerals. Consequently, the Court would have better relied on the scientific writings of the Arabic scientist Avicenna that came to the West as a result of the Crusades.

> plenitude of its authority, and, therefore, the emperor's pleasure, expressed by edict or by letter, had force of la. Even in the fervent age of its conversion the empire employed its refined civilization, the accumulated wisdom of the ancient sages, the reasonableness and subtlety of Roman law, and the entire inheritance of the Jewish, the pagan, and the Christian world to make the Church serve as a gilded crutch of absolutism.

Lord Acton, *The History of Freedom and Other Essays* (London: The Macmillan Company, 1907, pp. 30-60, *cited in Readings in Church History*, Barry, Colman J., O.S.B., *ed.*, (Westminster, Maryland: The Newman Press, 1965). Thus, any analysis of church-state relations must devolve from the firm historical understanding that it was the Roman State that captured the Church, not the other way around. The actual act of annexation of the Christian church by the Roman State is found in Constantine's *Edict of Milan* in 313 C.E.

Contemporaneously with the *Edict of Milan*, Constantine, Eastern Roman Emperor in Constantinople, also issued his *Edict of Toleration* jointly with Licinius, Western Roman Emperor. It provided, in pertinent part,

> [F]or the sake of peace in our time a similar public and free right to practice their religion or cult is granted to others, so that every man may have free opportunity to worship according to his own wish. This has been done by us to avoid any appearance of disfavor to any one religion.

Church and State Through the Centuries, Ehler, Sidney Z., *trans.*, (Westminster, Maryland: The Newman Press, 1954), pp. 5-6; Barry,

Vol. I, p. 77.

Significantly, the toleration evidenced by the Edict of Milan would be replaced by Licinius's successor, the Emperor Theodosius "the Great," who in his Codex of 380 C. E. decreed:

> It is Our will that all the peoples who are ruled by the administration of Our Clemency shall practice that religion which the divine Peter the Apostle transmitted to the Romans, as the religion which he introduced makes clear even to this day. It is clear that this is the religion that is followed by the Pontiff Damasus and by Peter, Bishop of Alexandria, a man of apostolic sanctity; that is, according to the apostolic discipline and to the evangelic doctrine, we shall believe in the single Deity of the Father, the Son, and the Holy Spirit, under the concept of equal majesty and of the Holy Trinity. We command that those persons who follow this rule shall embrace the name of Catholic Christians. The rest, however, whom We adjudge demented and insane, shall sustain the infamy of heretical dogmas, their meeting places shall not receive the name of churches, and they shall be smitten first by divine vengeance and secondly by the retribution of Our own initiative, which We shall assume in accordance with the divine judgment.

The Theodosian Code, Pharr, Clyde, *trans.*, (Princeton, New Jersey: The Princeton University Press, 1952), XVI, 440-476; Barry, Vol. I, pp 142-143. Thus begins "Christendom" and the domination of the church by the Western Roman Emperors.

In contradistinction to Theodsius's adjudication of non-Catholics as demented and insane, the Western Church's theologians had a decidedly different attitude. Boethius (d. 526) of the ancient

Anicii family was chancellor to the Emperor Theodoric the Ostragoth before being executed for his decidedly democratic tendencies - tendencies which continued to flourish in the East under the Emperor Justinian. Citing the philosophy of Aristotle while writing from his prison cell before his death, Boethius opines that "reason belongs to the human race alone" and further, in spite of human concupiscence, "mortal men have their freedom of judgment intact; and since their wills are free from all binding necessity, laws do not set rewards or punishments unjustly." Boethius, *The Consolation of Philosophy*, Cooper, W.J., trans., (New York: Random House, Inc., 1943), pp 101-120; Barry, Vol. I, pp. 198-204. According to Barry, "[i]n this work [Boethius] brought Aristotle to the schoolmen of later generations, and his much quoted treatise had a profound influence on coming ages." *Id.*, p. 178.

The *Consolation* has a remarkable consonance with the *Codex Justinianus*, promulgated by the Eastern Roman Emperor, Justinian, in Constantinople, ca. 534 C.E.

> Justice is the constant and perpetual wish to render every one his due. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust. The maxims of the law are these: to live honestly, to hurt no one, to give every one his due. The study of law is divided into two branches; that of public and that of private law. Public law is that which regards the government of the Roman Empire; private law, that which concerns the interests of individuals. We are now to treat of the latter, which is composed of three elements, and consists of

> precepts belonging to natural law, to the law of nations, and to the civil law.

Justinian, *The Institutes*, Sandars, T.C., *ed.* (New York: Longmans, Green & Co., 1948), pp. 349-374; Barry, Vol I, pp. 149-150.

This clash of philosophical ideas between the Eastern and Western Roman Emperors is critical to a proper understanding of the church-state phenomenon. In the Eastern Church, where most of the Church's theologizing and philosophizing took place between the Councils of Nicea, 325 C.E., through Ephesus (431), to Chalcedon (451), there developed a theory of a natural law common to all mankind. Indeed, it was the same Emperor Justinian who wrote that "[w]ars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free." *Id.* In the West, on the other hand, the Ostragothic invasions led, by the time of Theodosius, to a culture of monarchical domination of a Church disconnected from its Eastern intellectual roots. Europe, it is commonly held, went into a period known as the "Dark Ages" from which it was not to emerge until the Church and its philosophy and theology could liberate itself from Imperial domination. From Boethius to the advent of Pope Gregory VII, the state of the church was in such decline that bishops and priests had become appointees of the civil power. That phenomenon gave rise to the practices commonly referred to as "simony" and "lay investiture."

The process by which the Western church was to free itself from imperial control arguably began under the auspices of Pope Gregory VII in his famous historical encounter with the Germanic Holy Roman Emperor, Henry IV, at Canossa in 1077. Gregory VII, for the first time in Western history, had the temerity to keep the emperor waiting in the snow of this Alpine village for three days before he would grant him reprieve from excommunication. This significant struggle is memorialized in the *Concordat of Worms*, executed by the protagonists' successors, Pope Callixtus II and Emperor Henry V in 1122. It theoretically ended simony and lay investiture. Practically speaking, the lay investiture crisis was decisively ended on the Church's own initiative at the Second Lateran Council in 1139 when clerical celibacy was mandated.

From this brief historical overview, it can be fairly concluded that church-state integration was at the initiative of the state and that church-state separation was at the initiative of the church. This historical conclusion is critical for assessing the facts presented in the case at bar.

C. Emergence of Western Democracy--A Historical Analysis

It is well argued that a key benefit of the Gregorian revolution was a Church that had returned to a tradition of intellectual integrity

lost to it since the time of Augustine, Bishop of Hippo.[3] The contemporary historian, Thomas Bokenkotter, summarizes the enormous change in the Church's intellectual life of the era as follows.

> The traditional method used in [theology] was the so-called *lectio* or reading, which was merely a critical reading or exegesis of sacred Scripture. In addition, the writings of the holy fathers of the Church were utilized to elucidate individual scriptural passages. Their opinions were catalogued and compared with one another. In the best example of this method - the famous *Sentences* of Peter Lombard (d. 1160) - there was some attempt to organize the material and arrange it according to topics such as the Trinity, Creation, Incarnation, and Sacraments to face new problems and offer new opinions. But still the whole emphasis was on the acceptance of tradition and authority, rational speculation being kept to a minimum.
>
> A new approach began in the twelfth century under the influence of the renewed study of Aristotle, the great master of rational speculation. Until then only his *Categories* and *Interpretation* had been known in the West and studied in Latin translation. They contained the essential techniques of ancient reasoning, and as interest in things intellectual revived, their study became the focus of the revival.
>
> It was the fascinating, stormy, and tragic Abelard (d. 1142) who did the most to popularize these logical studies at Paris; he pioneered in using Aristotelian categories of thought in order to reach a deeper understanding of the Christian dogmas. He took a

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[3] With Augustine and his well known work, *The City of God*, we begin to see the planting of the seed of Christianity and human freedom in the West. Augustine opined that the earthly city, which shall not be everlasting, has its good in this world and rejoices in it with such joy as things can afford. Significantly, it was Augustine who first brought Christianity to England in the early sixth century.

carefully reasoned approach to theological questions, not denying the role of authority but making every allowance for rational objections and natural human feelings. In other words, he was the first theologian to view theology as a whole and attempt a grand synthesis of the data of reason with the data of faith. In so doing he provided us with a new understanding of what theology was all about.

But he was limited by the small number of Aristotle's works that were available, and he died on the threshold of the momentous revolution in medieval thought that was caused by the rediscovery of Aristotle's complete works. Over a period of roughly a hundred years (1150-1250), all of Aristotle's writings were translated and introduced in the West, accompanied by a formidable number of Arabic commentaries as well as by other scientific and philosophical works, Jewish and Arabic. This amounted to a vast new library. The work of assimilating and mastering it occupied the best minds of Christendom and profoundly altered the spiritual and intellectual life of the West.

Its effects on theology were earthshaking. The translation and dissemination of the complete works of Aristotle confronted Christian thinkers for the first time with a completely different rationalistic interpretation of human experience and indeed of the whole of knowable reality. Aristotle was an encyclopedic writer whose thought covered the whole spectrum of Greek science and philosophy: botany, zoology, astronomy, physics, logic, metaphysics, epistemology, ethics, and political science, not to mention various minor inquiries. He classified, organized, and systematized all the available knowledge of his day and always from an utterly rationalistic point of view. He saw the world as one vast, self-contained, self-explanatory organism.

> This invasion of Aristotle, accompanied by the work of such masterful Arabic commentators as Avicenna (d. 1037) and Averroes (d. 1198) - who emphasized the unspiritual and nonreligious character of the philosopher's thought - precipitated a grave crisis for the intellectual leaders of the West. It offered a totally rationalistic and this-world solution to all the major problems facing humanity. Assimilating and harmonizing all of it with the Christian faith constituted a tremendous task. The effort to do so profoundly altered the spiritual and intellectual climate of Christendom. It inaugurated a period of unparalleled intellectual activity and ferment that reached its climax in the thirteenth century, especially at Paris and Oxford, and in the schools of the newly founded mendicant friars.

Bokenkotter, T., *A Concise History of the Catholic Church*, (New York: Doubleday, 1990), pp. 144-145.

The role of the papacy in this transformation should not be underestimated, particularly in light of the anti-papal attitudes that have had enjoyed some currency in the brief history of the American Experiment.

> Pope Gregory IX issued a bull in 1231--the Magna Carta of the University of Paris--that clearly defined its essential rights, including the right to boycott. In appreciation for this help, the University of Paris became the favorite of the papacy.

> Favored by the Popes and even by secular rulers, universities multiplied, adopting as models the organization of Paris or Bologna. They included Salerno (c. 1200), Oxford (1200), Cambridge (1209), Naples (1224), Padua (1222), Pisa (1303), Salamanca (1220), Toulouse (1230), Prague (1348), Heidelberg (1385), and Louvain (1425). Paris, however,

> remained pre-eminent and served a student population reckoned at around five thousand.
>
> The monk Gratian made Bologna the Canon Law capital of Europe. In his immortal Decretum (c. 1140) he assembled a vast number of canons or sacred laws decreed at innumerable church councils, put them in order, and clarified their meaning with brilliant commentary. The study of civil law began with the rediscovery of the Emperor Justinian's Code in the eleventh century. Bologna also led the way here.

Id., pp. 142-143.

Concurrent with its initiatives in the intellectual arena, the papacy was contemporaneously acting in the political sphere as well, using its newfound power over the emperors with surprising result.

> Probably the greatest triumph of Innocent's spiritual sword was his victory over King John (d. 1216) of England after a quarrel that proved to be a memorable event of the King's reign and of some importance for world history because of its relation the signing of the Magna Carta. John was a bad man - unbalanced, cruel, cynical, happiest in the company of fellow scoundrels who enjoyed his rodomontade in mockery of everything serious and sacred. Greedy and indolent, he was to die appropriately from gorging himself with peaches and new cider.
>
> His trouble with Innocent began when in defiance of Canon Law requiring free elections, John tried to impose his own nominee as archbishop of Canterbury. Upon appeal, Innocent decided against John and proposed Stephen Langton for the office. Stephen was duly elected by the clergy, but John refused to allow him entry into England. The Pope, who all along had strictly adhered to Canon Law, had no other alternative but to place England under interdict: No

> religious services except baptisms and funerals were permitted. The interdict dragged on for nearly six years, while the religious life of England virtually ceased: churches boarded up; bells silent; and priests idle, many of them in exile as John, in retaliation, struck back hard by terrorizing the clergy and confiscating their property.
>
> But Innocent finally brought John to his knees in 1213 when in alliance with Philip Augustus of France, he threatened an invasion of England. It was too much for John; he felt unsure of support from his subjects, whose loyalty had been severely strained by the interdict. He submitted abjectly, performed an act of homage, and placed England under feudal vassalage to the Pope.
>
> But then a paradoxical switch occurred, a second act in the drama, placing the Pope and John together on one side and Stephen Langton, the archbishop, and the barons on the other. The latter revolted against certain abusive demands and tyrannical acts of the King, and with the advice and support of Langton decided to force a written guarantee of their rights from the King. A duel of wits and arms ensued. John took the cross, pleading a crusader's immunity and claiming the right to papal arbitration. But the barons finally forced him to sign the Great Charter or Magna Carta at Runnymede on June 15, 1215. It consecrated the principle of government by law rather than arbitrary despotism and so represents the beginning of the English Constitution.

Id., pp. 115-116.

Notwithstanding the arguably favorable involvement of the papacy in the formation of the English Constitution, it is to the product of its university movement that we look for the definitive

developments in the Western philosophical and legal traditions that survive to this day and that are at issue in this lawsuit.

The most significant figure that is associated with the then newly formed University of Paris is that of St. Thomas Aquinas. Of Aquinas, Bokenkotter writes:

> Like Albert the Great [Thomas's teacher at Paris], Thomas was confident that faith and reason were ultimately compatible, and like him, he recognized the complete autonomy of secular knowledge as the domain of human experience subject to its own proper laws. He mastered all the thought of his time, and his massive collection of works include every type of theological and philosophical work. He completely assimilated Aristotle and expropriated his fundamental intuitions--but did not uncritically accept the whole Aristotelian doctrine. Drawing on the entire Western philosophical tradition--Platonists and Neo-Platonists, Arabs as well as Christians--he was able to construct a new, original philosophy: Thomism, the first original metaphysics since Aristotle. By an ingenious synthesis of Aristotelian, Platonic, and Christian insights he developed as his central idea a rational understanding of God as the creator and source of all being, goodness, and truth, present in all beings by his power and essence, the uncaused cause, in whom alone essence and existence are one. With this philosophy as his basis and making use of all available sources of knowledge, he then wrote his masterpiece, the *Summa Theologiae* (1266-1274)--the summit of his life's work and one of the finest hours of human genius.

Id. at 146-147.

It is from that genius of Thomas that we begin to hear the themes most familiar to this democracy: reason and self-evident truth.

> Any proposition is said to be self-evident in itself, if its predicate is contained in the notion of the subject. . . . For instance, this proposition: *Man is a rational being*, is, in its very nature, self-evident, since he who says *Man*, says *A Rational Being*; and yet to one who does not know what a man is, this proposition is not self-evident. Hence it is, as Boethius says, certain axioms or propositions are universally self-evident to all. . . . It is therefore evident that, as regards the common principles whether of speculative or of practical reason, truth or rectitude is the same for all and is equally known by all.

Aquinas, *Summa Theologica*, Fathers of the English Dominican Province, trans., (New York: Benziger Bros., Inc., 1947), I, 1008-1013; Barry, Vol. I, pp. 382-389.

It should be self-evident to any American reader of the nation's Declaration of Independence that Thomas is clearly among the progenitors of Western democracy. Consequently, when Thomas's church in modern times declares that it "deplores the discrimination between believers and unbelievers which some civil authorities unjustly practice, in defiance of the fundamental rights of the human person,"[4] that church is asserting the Thomist thesis that "truth or rectitude is the same for all and is equally known by all." That is the key thesis that is arguably repudiated by the religious display in the 190th that forms this basis of this lawsuit.

Directing the historical analysis after the post-Thomistic and

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[4] *See* Vatican II, Decree on the Church in the Modern World, *Gaudium et Spes*, n. 21 (emphasis added).

post-Magna Carta period, we confront the dissolution of the monolithic Western church in the Protestant Reformation. It is to Calvin that we turn to see, in sharp relief, the key philosophical issue of the day that relates to the concept of reason, self-evident truth, and the human secular, natural law capacity for self-governance.

> At first man was formed in the image and resemblance of God in order that man might admire his Author in the adornments with which he had been nobly invested by God and honor Him with proper acknowledgment. But, having trusted such a great excellence of his nature and forgotten from whom it had come and by whom it subsisted, man strove to raise himself up apart from the Lord. Hence, man had to be stripped of all God's gifts of which he was foolishly proud, so that, denuded and deprived of all glory, he might know God whom man, after having been enriched by his liberalities, had dared to despise. As a result, this resemblance to God having been effaced in us, we all who descend from the seed of Adam are born flesh from flesh. For though we are composed of a soul and a body, yet we feel nothing but the flesh, so that to whatever part of man we turn our eyes, it is impossible to see anything that is not impure, profane and abominable to God. The intellect of man is indeed blinded, wrapped with infinite errors and always contrary to the wisdom of God; the will, bad and full of corrupt affections, hates nothing more than God's justice; and the bodily strength, incapable of all good deeds, tends furiously towards iniquity.

Calvin, Jean, *Instruction in Faith*, Geneva, 1537; Fuhrman, Paul, *trans., ed*; copyright 1949, The Westminster Press.

Of Calvin, the noted contemporary Protestant theologian, Paul Tillich, writes, "What he [Calvin] said -- with Zwingli -- is that a

theocracy has to be established, the rule of God through the application of evangelical laws in the political situation."[5]

It is hard to conceive of a philosophy more at variance with the concept of the fundamental goodness of human creatures than that found in Calvin.[6] Indeed, in researching Calvin's underlying *Institutes on the Christian Religion*, one finds direct polemical attacks against both Thomas and Aristotle.[7] Were this conflict to remain solely in the province of the philosophers and theologians, the matter would be academic. However, Calvin, like most Western thinkers including Aquinas, drew the inevitable political inferences from his doctrine. It has to do with the "Devine" appointment of judges.[8]

> The Lord has not only testified that the status of the magistrate or civic officer was approved by him and was pleasing to him, but also he has moreover greatly recommended it to us, having honored its dignity with very honorable titles. For the Lord affirms that the fact that kings rule, that counselors order just things, and that the great of the earth are judges, is a work of his wisdom. And elsewhere, he calls them gods,

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[5] Tillich, Paul, *A History of Christian Thought*, p. 273.

[6] The conflict can be judicially noted even more clearly now that the Roman Easter liturgy can be heard in English. At the Easter vigil, a song of praise is sung to the Risen Christ as symbolized by the paschal candle. Its Latin source was the *Exultet* hymn and it contains the concept of the *felix culpa*. In English translation, it is sung thusly, "O Happy Fault, O Necessary sin of Adam that brought to Earth so Great a Redeemer."

[7] *See Institutes*, Ch. XV, n. 6, "Opinions of the philosophers criticized in view of the fall of Adam." *Op. cit.*

[8] The pun is the defendant's. *See The Link Letter*, Spring, TX, Vol. 1, No. 7, September 1993. Headline: **Our Judicial System Needs "Devine Intervention"** (emphasis original).

> because they do his work. In another place also they are said to exercise judgment for God, and not for man. And Saint Paul calls the higher offices gifts of God. But where he undertakes a greater discussion of the matter, he teaches very clearly that their power is ordered by God, and that they are ministers of God for praising those who do good and for accomplishing the retribution of God's wrath on the bad. Hence princes and magistrates must think of Him whom they serve in their office, and do nothing unworthy of ministers and lieutenants of God. All their solicitude must be in this: to keep in true purity the public form of religion, to establish and to guide the life of the people by very good laws and to procure the welfare and the tranquility of their subjects, both in public and in private. But this cannot be obtained except through justice and judgment, which two things are to them particularly recommended by the prophet. Justice is to safeguard the innocent, to maintain, to keep and to free them; judgment is to resist the audacity of evil men, to repress violence, and to punish misdeeds.

Calvin, Jean, *Instruction in Faith*, Geneva 1537; Barry, Vol II, pp. 43-44. Aquinas, on the other hand, had held that magistrates are not God's lieutenants. Instead, the people (*multitudo*) as a whole may make laws or they may authorize the sovereign to do so in which case the latter "has the power of legislating only in so far as he bears the person of the multitude."[9]

D. Church State Separation--A Historical Analysis: From Reformation to Revolution

The Reformation is of further interest to American

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[9] See Aquinas, Sentences, I-II, Q. 97, A. 3.

jurisprudence inasmuch as it involves the formation of an English national church by Henry VIII in the *Edict of Separation* of 1534. The key historical question is whether and to what extent that separation involved an abandonment of the Thomist synthesis. The question arose in the well known historical controversy concerning whether the Church of England or Anglican Church would de-Romanize or "purify" itself to follow the Calvinist model.

> This is the thing they [the "Puritans"] require in us, the utter relinquishment of all things popish. The question there is, whether we may follow the Church of Rome in those orders, rites, and ceremonies wherein we do not think them blameable; or else ought to devise others, and to have no conformity with them.
>
> A thousand five hundred years and upward the Church of Christ has now continued under the sacred regiment of bishops. Neither for so long has Christianity ever been planted in any kingdom throughout the world but with this kind of government alone; which to have been ordained of God, I am for mine own part resolutely persuaded.... Wherefore in these histories of the Church we find very ancient mention made of our bishops. At the Council of Arminium, about the year three hundred and fifty-nine, Britain had three of her bishops present. At the arrival of Augustine, the monk whom Gregory sent hither to reclaim the Saxons from Gentility about six hundred years after Christ, the Britons he found observers still of the selfsame form it remained till the days of the Norman Conquerer. By him and his successors thereunto sworn, it has from that time till now by the space of five hundred years been upheld.

Hooker, Richard, "The Law of Ecclesiastical Polity," London, 1592;

cited in Great Voices of the Reformation, Fosdick, H., *ed.*, (New York: Random House, 1952); Barry Vol. II, pp 79-87.[10]

"Hooker tried to take a middle position between Catholicism and Puritan Presbyterianism, and he stressed traditional aspects of liturgy and ecclesiastical government contained in the national Church of England. He thus set the Anglican movement apart from the continental reformed extremists [Calvin and Zwingli], and especially the English dissenters [Puritans], who began at once to break away from the Church of England." Barry, Vol. II, pp. 7-8. It might also be concluded that Hooker's position was in accord with the theological tradition of St. Anselm of Canterbury. Anselm predated Aquinas and the university movement by almost two hundred years. Yet, he was able to relight the torch of Boethius with his famous concept of theology as *fides quaerens intellectum*, faith seeking understanding, found in his *Proslogion* of 1093. Finally, Hooker's position was inevitable in light of the then well-developed English judiciary which, in its principles of *stare decisis* and deference to higher judicial authority, in many ways mirrored the apostolicity and collegium of the episcopacy which the Church of England -- and later the American Episcopal and Methodist Churches -- were to retain. Thus, in retrospect, it is easy to see why England in the post-Reformation period

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[10] Of Hooker, Pope Clement VII said, "There is no learning that this man has not searched into, nothing too hard for his understanding; this man indeed deserves the name of an author: his books will be reverences as they grow in age." Barry, Vol. II, p. 7.

did not divorce itself from the major organizational, philosophical, and intellectual currents of the Western tradition. The "divorce" was almost purely political.[11] The English of Hooker's day perhaps also remembered that it was a six year Papal interdict (1219-1225) that forced King John to sign the Magna Carta.

The Puritan breakaway is significant for American church-state relations in that the original English colonizers were decidedly theocratic. The Mayflower's first port of departure was from Leiden with a cargo of Calvinist, Dutch Reformed Church passengers. Their rule in Massachusetts was marked by public stocks and the Salem witch burnings. However, their impact on the colony was blunted in 1638 by the breakaway Roger Williams who established the first colony with complete freedom of religion, Rhode Island and Providence Plantations.[12] Arguably, Williams made way for the predominantly Anglican "Virginians" to dominate the development of the Constitution.

Meanwhile, the post-reformation period on the continent saw the establishment of the Society of Jesus by Ignatius Loyola. It was to have a significant impact on the development of continental democratic theory that, contemporaneously, stood in stark contrast to Puritan

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[11] To this day, upon entering Westminster Abbey, one is greeted with Greek icons of Christ as *Pantocreator* and Mary as *Theotokos*. There is also a discreet sign near the door: "Priests are available for confession upon request."

[12] The First Baptist Church in America is on the campus of Brown University in Providence.

Massachusetts.

> A civil magistracy accompanied by temporal power for human government is in complete harmony with human nature. . . . The second principle is as follows: in a perfect community, there must necessarily exist a power to which the government of that community pertains. This principle, indeed, would seem by its very terms to be a self-evident truth. . . . There is, *in fine*, an *a priori* reason in support of this view, a reason touched upon by St. Thomas, namely: that no body can be preserved unless there exists some principle whose function it is to provide for and seek after the common good thereof, such a principle as clearly exists in the natural body, and likewise (as experience teaches) in the political.
>
> The righteousness and necessity of civil magistracy signifies nothing more or less than a man or number of men in whom resides the above mentioned power of governing a community. For it is manifest that such power must dwell in men, inasmuch as they are not naturally governed in a polity by the angels, nor directly by God himself, who acts by the ordinary law through appropriate secondary causes, so that it is necessary and natural that they should be governed by men. I hold then that a human magistracy, if it is supreme in its own order, has the power to make laws proper to its sphere; that is to say civil or human laws which, by force of natural law, it may validly and justly establish.

Suarez, Francisco, S.J., *De Legibus ac Deo Legislatore*, Salamanca in "The Classics of International Law," Brown, J., tr., (London: The Clarendon Press, 1944); Barry, Vol. II, pp. 193-203. Suarez also rejected the divine right of kings in 1613 in his work, *Defensio Fidei Catholicae*. Not surprisingly, the Society was suppressed in 1773 by

Clement XIV at the request of the kings of Spain and France. It was, however, reinstated in 1814 by Pius VII, after the French Revolution had run its course.

D. Church State Separation--A Historical Analysis: The American Experience

One cannot help but hear echoes of Suarez in the American Declaration of Independence and Constitution, especially the notion of self-evident truth that was the hallmark of Aquinas and his scholastic philosophy. Suarez also provided a precise and workable theory under which civil government may honor God in a secular or natural manner. **"For it is manifest that such power must dwell in men, inasmuch as they are not naturally governed in a polity by the angels, nor directly by God himself, who acts by the ordinary law through appropriate secondary causes, so that it is necessary and natural that they should be governed by men."** This important distinction provides a theoretical basis for a government that can, at the same time, gratefully acknowledge the contribution of its citizens who arguably may be supernaturally or heroically driven, and also acknowledge that all men have the capacity for participation in the process of self-government, believers and unbelievers alike. That duality can be seen from the Church's side in a famous address by John Ireland, the Archbishop of St. Paul-Minneapolis on the occasion of his induction in the *Academie Francaise* in 1892.

In America we have a free Church in a free country,

> and the Church is happy in her freedom. Many Americans, unfortunately, have no positive creed; they have, however, deep religious instincts. Religion -- respect and love of religion -- permeates all the institutions of the country. . . . America has its national and religious festivals. Each year the President of the United States issues a proclamation appointing a day of thanksgiving to God for all the blessings received during the preceding year by the country and the day is religiously observed by all -- Catholics not being the least conspicuous in readiness to respond to the chief magistrate. Congress and state legislatures have their chaplains; the sessions inevitably open with a prayer to the deity. At public banquets a minister of religion invokes the blessings of heaven on those present. The Sunday is observed with a great solemnity that surprises those that come among us for the first time. The religious instincts and customs of the American people give reason to entertain great hope for the future of the country.
>
> We are not all of one mind on religious questions; indeed, upon many matters, we are at variance. But we know one another and we love liberty -- and we take it as our rule to grant to others what we wish to have for ourselves. We never use the law to enforce our own personal ideas. We respect others because we wish ourselves to be respected.

Ireland, John, "An American in France," Paris, 1892; in *The Church and Modern Society* (New York: D.H. McBride and Co., 1903); Barry, Vol. III, pp 154-166.

Interestingly enough, Archbishop Ireland had been summoned to Europe by Pope Leo XIII in response to "The Lucerne Memorial," a complaint from a German layman, Cahensly, and German and Swiss continental sources that the American Church was too Irish and too

liberal. Cahensly wanted German and other ethnic parishes established under German and other foreign speaking bishops. Ireland addressed the matter to his Parisian audience. "Had the Lucerne Memorial been listened to by the Holy See, the episcopate of America would now be the object of suspicion by the government, and Catholics would be looked upon as foreigners encamped on the soil of the republic." Ireland held the day.[13]

E. Church State Separation--Conclusions from the Historical Data

U.S. Supreme Court Justice Jackson summarized it well. "I should suppose it is a proper, if not an indispensable part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that for good or ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences derived from paganism, Christianity -- both Catholic and Protestant -- and other faiths accepted by a large part of the world's peoples." *McCollum v. Board of Education*, 333 U.S. 203, 235-236 (1948). Justice Jackson appears to understand the full range of historical sources involved in the formation of Western democracy. As the

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[13] During the pontificate of Benedict XV, 1914-1922, the American hierarchy gradually became almost completely of Irish descent owing to Benedict's wish that the American Church blend in the American culture, feeling that native English speaking bishops, the Irish, would best accomplish that task. This in no small part explains the ascendancy of the Irish Catholics, epitomized by the election of John F. Kennedy in 1960.

historical data illustrate, one of the most powerful influences involved was that of Aristotle, the "pagan" philosopher, whose Nicomachean Ethics had been preserved by Muslim scholars and translated by Averroes, from that tradition. Aristotle's influence should not be underestimated. Not only was he relied on by Thomas in the development of the *Summa*, but his techniques of analogical reasoning were adopted by both Thomas and the legal profession that was founded in Bologna, Paris, and Oxford in the formative years of the thirteenth century.[14]

Justice Jackson is not alone in his assessment that the historical sources involved in the formation of Western democracy have been both "for good or ill."

> Another painful chapter of history to which the sons and daughters of the church must return with a spirit or repentance is that of the acquiescence given, especially in certain centuries, to intolerance and even the use of violence in the service of truth.
>
> It is true that an accurate historical judgment cannot prescind from careful study of the cultural conditioning of the times, as a result of which many people may have held in good faith that an authentic witness to the truth could include suppressing the opinions of others or at least paying no attention them. Many factors frequently converged to create assumptions which justified intolerance and fostered an emotional climate from which great spirits, truly

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[14] For a lucid and contemporary assessment of the influence of the Aristotelian principle on the operation of the Western jurisprudence, *see A Theory of Justice*; Rawls, John (Harvard: Belknap Press, 1971).

> free and filled with God, were in some way able to break free. Yet the consideration of mitigating factors does not exonerate the church from the obligation to express profound regret for the weaknesses of so many of her sons and daughters who sullied her face, preventing her from fully mirroring the image of her crucified Lord, the supreme witness of patient love and of humble weakness. From these painful moments of the past a lesson can be drawn for the future, leading all Christians to adhere fully to the sublime principle stated by the council: "The truth cannot impose itself except by virtue of its own truth, as it winds over the mind with both gentleness and power."

John Paul II, Pope, *Tertio Millenio Adveniente: Apostolic Letter for the Jubilee of the Year 2000*, in ORIGINS, (Washington: Catholic News Service, 1994), Vol. 24: No. 24; *citing* Vatican II, DECREE ON RELIGIOUS FREEDOM, *Dignitatis Humanae*, 1965.

Another conclusion that may arguably be drawn from the historical data is that the professional practice of theology began at the same time and place as the practice of law, and in response to the same set of historical circumstances. Of critical concern to theology, then, is the necessity for it to follow the path of historical-critical analysis that is enshrined in the legal profession in the practice of *stare decisis*. Religion divorced from scholarship leads to violence, as Pope John Paul II clearly understands.

Another historical conclusion is that it may **not** be argued that religious involvement in state affairs necessarily leads to the use of the church as the gilded crutch of despots. While that has generally proven

to be true in the West, as Acton noted, the same cannot necessarily be said of the Eastern tradition. In that regard, the distinction between the attitudes towards tolerance of Theodosius in the West and Justinian in the East are quite remarkable. Justinian and the Eastern church's ongoing connection with the best of its own scholarship at the theological schools of Antioch and Alexandria proves that it is anti-intellectualism rather than church-state comity that is the source of the problem.

Finally, the theological enterprise in the West has traditionally been a collective effort reflected in the Western (read Jewish-Roman-Anglican-Methodist) theological tradition. Collegiality has been the hallmark for twenty-five hundred years in the Rabbinical schools and the *stare decisis* character of its theologizing is reflected throughout the Western tradition. It is reflected, as Hooker notes, in the *collegium* of bishops and its insistence on almost complete apostolic unanimity on disputed theological questions. Western style collegiality is also reflected in the Anglo-American judicial principles of *stare decisis*, deference to higher court authority, and comity. Finally, collegiality is available to all through the university movement, established as an independent "estate" by Gregory IX in the charter of the University of Paris.[15]

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[15] Counsel for plaintiffs would be remiss not to acknowledge and sincerely thank his former teachers and collegial brethren who have been both a source of critical reflection and personal encouragement. As noted below, Dr. Derek Davis, Director of the Dawson Institute for Church-State Studies at Baylor University served as the expert

It is with these propositions in mind that the plaintiffs now turn to the applicable facts and law of this case.

II. CONTENT OF THE DISPLAY: THE INTENDED MESSAGE

This Court has already noted the judicial admission of defendant's counsel that there is no factual controversy regarding the existence of the texts in the courtroom. The court has also taken judicial notice of the case file which contains the following statement of facts excerpt:

> Q. (By Mr. Shea) Judge, I'm going to ask you to basically confirm what it is that we have in these various depictions. The first one appears to be a citation from Isaiah 16:1 through 5. But the particular edition is the Bishop's Bible printed in London in 1585; is that correct?
>
> 2. That's correct.
>
> Q. Then the second depiction is -- appears to be from Deuteronomy 5:12 through 22, which again is a

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witness in this case. His acumen and intellectual integrity illustrate clearly that the best of the Western tradition is not confined to the Jewish-Roman-Anglican-Methodist tradition. Fr. Raymond Collins, STD, Dean of the School of Religious studies at Catholic University of America and former Magister Professor of New Testament Studies a Louvain provided valuable insights into the formation of the canon of scripture and the development of the university movement. Fr. Robert Duffy, a retired Episcopal priest of the Diocese of Rhode Island provided valuable insight into the underlying spiritual currents of the West as well as into the English Reformation. Finally, Fr. John Finnegan, JCD, former professor of Church History at Pope John XXIII National Seminary, Harvard University, and elsewhere, and President Emeritus of the Canon Law Society of America, must bear the burden of being counsel's principal interlocutor and moral support.

leaf from the Bishop's Bible printed in 1585?

A. That's correct.

Q. Now, this particular depiction, is that not also a depiction -- is that not also a recitation of the Ten Commandments?

A. It is.

Q. Okay. How many versions -- do you know how many versions of the Ten Commandments there ae?

A. Only one that I know of.

Q. Okay. This one is in Deuteronomy?

A. Yes.

Q. Are you aware that there is also one in Exodus?

A. Yes.

Q. And that E

MR. TREECE: Your Honor, we object based on relevance to the nexus connection.

MR. SHEA: Again, the -- may I respond?

THE COURT: I sustain the objection. Sir, if -- if you will please confine your questions and answer to the particular case, on the bias or prejudice the witness has as to this case.

MR. SHEA: Okay. The bias or prejudice

argument, Your Honor, has to do with the possibility that not only is there being displayed here a preference for religion in general, or the source of the Ten Commandments and the common law, but that there may be a preference for a certain brand of religion versus another. And I think that's very highly relevant to the case for the historical reasons we're going to get into when the expert - when I put on my expert.

Now, if -- first of all, with respect to the Ten Commandments, that is not the Jewish depiction of the Ten Commandments, and my expert will testify to that fact.

MR.. TREECE: Your Honor, our same objection. Unless the jurors have telescopic vision, they can't even see that wall.

And our whole point again, we have conceded there might be some case somewhere down the line where this courtroom might be the inappropriate place to try given the subject matter. And I believe that Your Honor, on the question on the Motion to Quash, limited inquiry in the subject matter of the case and Judge's bias or prejudice in that matter. And that's why we have that objection.

THE COURT: Yes, sir; I will sustain the

objection.

Q. (By Mr. Shea) Okay. Now, the third text, Your Honor, appears to be from Micah 6 --

MR. TREECE: Same objection, Your Honor.

THE COURT: I sustain that objection, too.

I don't know, sir, if you want to inquire into his religious knowledge and whether he's an expert or not on religion, that has nothing to do with this particular case, in my opinion.

MR SHEA: Judge, I need to just get these in the record.

THE COURT: For that purpose I will let you get them in the record.

Q. (By Mr. Shea) Okay, Now, and the third leaf is adopted from Micah 6:8, again from the same edition, 1585?

A. Yes, I hope so.

Q. The next one is Exodus 18:21 through 23, again particular leafs from the Bishop's Bible?

A. That's right.

Q. Now, finally we have one from Judges 2:16 through 19, again from the 1585 edition?

A. That's right.

Q. My first question then, is there any

significance to the -- the selection of these particular verses coupled with the Ten Commandments? Is it just happenstance, or is there some specific message that this depiction is intended to communicate?

A. Those verses are special to me because it talks about a person's obligation to do justice on behalf of the widow and the fatherless.

Q. Among any of those texts --

MR. TREECE: Your Honor, is this examination just for the purpose of a record, so I don't have to keep objecting as to relevance?

THE COURT: Yes, sir.

Q. (By Mr. Shea) Judge, in any of the depictions in this Court, do any of these depictions contain the notion that the judge is acting in any way as God's deputy or vice-gerent?

A. I don't know.

Statement of Facts, Motion to Quash and Motion to Recuse, October 22, 1996, pp. 32-36.

Plaintiffs have contended in the state court action, and contend here, that Judge Devine misrepresented his testimony on the significance of the content of the various scriptural texts. The alleged misrepresentation forms the basis of a current motion to recuse Judge Devine from the state court action. The motion makes reference to a

prior proceeding in which counsel for plaintiffs went to some length to illustrate that the texts found in the 190th Courtroom are the proof-texts used in Calvin's *Institutes on the Christian Religion* that support the notion that (a) humans are incapable of self-governance, and consequently, (b) we need divinely appointed judges to rule over us as vice-gerents of God. Counsel for plaintiffs also went to some length in that hearing to illustrate that Calvinism is diametrically opposed to the Greco-Thomist democratic thesis that judges are vice-gerents of the people (*gerentis vice totius multitudinis*). The motion continues, in pertinent part:

> A careful review of the scriptural passages found on the courtroom wall, as recited in the record at both hearings (S.F., pp. 32:12-35:20), indicates the following content: Isaiah 16:1-5, the so-called "Inaugural Vision," deals with the Divine establishment of the Rule of David. Deut. 5:12-22 is the Deuteronomic version of the decalogue. Micah 6:1-8, in the opinion of at least one scholar is the Magna Carta of prophetic religion. Exodus 18:21-23 deals with the "divine appointment of judges." Judges 2:16-19 deals with God "raising up" judges to deal with the enemies of the people. This examination of the textual content in the courtroom is at variance with the following testimony of Judge Devine: Q: (By Mr. Shea) "My first question then, is there any significance to the -- the selection of these particular verses coupled with the Ten Commandments?" Is it just happenstance, or is there some specific message that this depiction is intended to communicate?" A: (By Judge Devine) "Those verses were special to me because it talks about a person's obligation to do justice on behalf of the widow and fatherless." (S.F., 35:22-36:5). Counsel for plaintiffs has searched those

verses in vain for any reference whatsoever to "a person's obligation to do justice on behalf of the widow and fatherless." Instead, and more to the point, Counsel for plaintiffs asked, "Judge, in any of the depictions in the Court, do any of these depictions contain the notion that the judge is acting in any way as God's deputy or vice-gerent?" A: (By Judge Devine) "I don't know." (S.F., 36:12-16).[16]

III. LEGAL ANALYSIS

"The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone v. Graham*, 449 U.S. 39, 41 (1980); *citing Abington School District v. Schempp*, 374 U.S. 203 (1963). Consequently, any attempt by the defendant to characterize his conduct as a display of historical documents, as intimated in the January 27, 1997 hearing, should be held to be without merit. Neither may defendant argue that his conduct "promotes moral values, the contradiction of the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." Those arguments were specifically rejected in *Abington*, 374 U.S. at 223.

Instead, plaintiffs take the position that this Court should follow a case even closer on point, i.e., The Ten Commandments in the courthouse. Just such a case arose in the Eleventh Circuit in 1993. There, both the Ten Commandments and the "Great Commandment"

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[16] The cited motion is not offered as competent summary judgment proof. However, the Court make take judicial notice of the scriptural texts cited therein.

were displayed on a wall in an alcove in the Cobb County, Georgia courthouse. *See Harvey v. Cobb County, GA*, 811 F.Supp. 669 (N.D.Ga. 1993); *aff'd* 15 F.3d (11th Cir. 1994); *certiorari denied* 114 S.Ct. 2138 (1994). In deciding the case, Senior District Judge Shoob made findings of fact similar to those filed in the instant case from Senior Judge Andrew Z. Baker. After reviewing issues of standing not presented in this case, the Court reviewed Establishment Clause cases beginning with the three-prong *Lemon v. Kurtzman* test: that a "practice that touches upon religion 'first...must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; (and) finally...must not foster 'an excessive entanglement with religion.'" (403 U.S. 602, 612-13, citations omitted). The Court then analyzed the denominational issues beginning with *Lynch v. Donnelly,* 465 U.S. 668 (1984) through *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Finally, the Court addressed the issue of religion vs. non-religion with a case from this circuit, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

With respect to content, the Court rejected the County's argument that the display represented a recognition of a "historical jurisprudential cornerstone of American legal significance," citing *Stone v. Graham* and reciting the Supreme Court's fact finding on the content of the Ten Commandments. The Court then looked at the context of the display and held that the panel, "when considered in its context, has the effect of endorsing religion in general and Christianity

in particular and therefore violate[d] the Establishment Clause." *Harvey*, 811 F.Supp. at 678. Here, not only does Judge Devine endorse religion in general and Christianity in particular, he demonstrably advances a particular form of Christianity that is opposed to the common law philosophical notion that all human beings, believers and unbelievers alike, are capable of ethical discernment and thus qualified to participate fully in the democratic process without explicit reference to revealed religion. Consequently, Plaintiffs contend that the reasoning in *Harvey* is sound, that it should be followed here, and that it provides an adequate and independent basis for immediate injunctive and summary relief.

In addition, plaintiffs contend that this case extends beyond the facts of *Harvey* into an actual courtroom and, as such, violates their rights to due process. As stated by the Supreme Court, "[i]t is part of our settled jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes . . . .'" *Texas Monthly*, 489 U.S. at 8; *citing Gillette v. United States*, 401 U.S. 437, 450 (1971). Consequently, inasmuch as the display involved here intrudes upon the secular business of an actual courtroom, we must analyze the business of the courtroom in light of the display, especially the decidedly secular tasks to which prospective and actual jurors are sworn.

To the panel in this case:

In this case as in all cases, the actions of the judge,

parties, witnesses, attorneys, and jurors must be according to the law. . . . I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial.

TEX. R. CIV. P. 226a

To the selected jurors:

By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. . . . You will now receive written instructions which you will observe during this trial with such instructions which I may hereafter give, or as heretofore I have given to you. . . .

You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings. . . .

Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

Id.

To the jurors on submission of the case:

[I]n the matters of law, you must be governed by the instructions in this charge. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1 Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. . . . . In your deliberations, you will not consider or discuss anything that is not

represented by the evidence in this case. . . .

4. You should not decide who you think should win and then try to answer the questions accordingly.

Id.

Plaintiffs contend that the role of jurors under the Texas Rules of Civil Procedure is secular, public, tightly controlled, and logical. It calls upon the jurors to leave aside any personal biases or prejudices, religious or otherwise, and participate in a disciplined intellectual exercise. Given these duties, the clear First Amendment violation in this courtroom, in the first instance, invites disobedience to the law. Next the display constitutes extraneous information that the jurors are sworn to ignore. Its content is, in some cases, contrary to religious belief, as in the suppression of sympathy. Finally, the effect of the display if allowed to stand is unreviewable on appeal. Consequently, plaintiffs contend that "an appropriate educational display that includes [Judge Devine's religious texts and icons]" that would pass constitutional muster in the hallways of the Courthouse, as in *Harvey*, would not pass constitutional muster in an actual courtroom under the due process clauses of the United States Constitution.

IV. CONCLUSION

In this matter, plaintiffs have had the benefit of expert advice from a prominent Baptist scholar. This Court may take judicial notice of a well written summary of that advice from Dr. Derek Davis,

Director of the J.M. Dawson Institute of Church State Studies at Baylor University, Waco, Texas. That summary is contained in the *Houston Chronicle*, Tuesday, October 29, 1996. It is attached hereto as Exhibit "A" and incorporated herein by reference as if set forth at length. Plaintiffs stand on Dr. Davis's conclusion with the *proviso* that any educational displays be outside an actual courtroom, under the control of Harris County. Further, should Harris County elect to proceed in this fashion, any display should convey the message that churches too wish to have their freedom and that the separation of church and state is as much, if not more, for their benefit as for the State's.[17]

WHEREFORE, PREMISES CONSIDERED, the Medinas again move for summary judgment and injunctive relief. Plaintiffs also ask for an award of attorney's fees in accordance with the attached affidavits of Christopher J. Lowman and William L. Wilks.

Respectfully submitted,

DANIEL J. SHEA, P.C.

By:/s/ Daniel J. Shea
DANIEL J. SHEA
S.D. Tex. I.D. No. 12585
1001 Fannin, Suite 4660

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[17] An educational display would well include, *inter alia*, some reference to the fact that one of the first acts of Pope John Paul II's papacy was to ask Rev. Robert Drinan, S.J., former dean of the School of Law at Georgetown University, to resign his position in the United States Congress. However well qualified Father Drinan was, the Pope had apparently learned his history well. Father Drinan, of course, immediately complied.

Houston, TX 77002-6712
(713) 651-7800
(713) 652-9051 Facsimile

ATTORNEY FOR PLAINFFS

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing *Plaintiff's Supplemental Memorandum in Support of Their Application for Preliminary and Permanent Injunctions, for Attorney's Fees, and Motion for Summary Judgment* has been filed with the Court and served in accordance with Fed. R. Civ. P. 5 the following individual:

Mr. R. Chad Geisler Via Facsimile: (512) 320-0667
Assistant Attorney General of Texas
General Litigation Division
P.O. Box 12548
Austin, TX 78711-2548

/s/ Daniel J. Shea

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT

RAMON A. MEDINA, P.E. Individually and as Parent of Luis-Francisco Emanuel Medina, Deceased; and MARIA TERESA MEDINA, Individually and as Parent of Luis-Francisco Emanuel Medina, Deceased Plaintiffs - Appellants;	§	
----------v.----------	§	**CASE NO. 97-20369**
JOHN P. DEVINE, Honorable; ET AL Defendants	§	
JOHN P. DEVINE, Honorable Defendant - Appellee	§	

APPELLANTS' MOTION FOR LEAVE

TO FILE CORRECTED RECORD

Pursuant to FED. R. APP. P. 16, appellants respectfully request leave to file a corrected record and for good cause would show as follows:

There is a material omission from the record that is relevant to this proceeding. On February 3, 1997, in his *Memorandum of Law and Amended Motion to Dismiss*, appellee recited the contents of his courtroom display which included, *inter alia*, "[f]ive excerpts from the Bible: Isaiah 16:1-5; Deuteronomy 5:12-22; Micah 6:8, Exodus 18:21-23; and Judges 2:16-19 . . . [and] a copy of the Ten Commandments,

painted in an authentic and aged manner." [Inst. 34, p. 7]. These are the same facts to which the parties stipulated at the hearing on appellants' motion for summary judgment [Inst. 55]. Appellee went on to argue in his *Memorandum* that ". . . the Ten Commandments text and Bible excerpts include symbols of at least two significant religions, Judaism and Christianity, whose teachings are in substantial conflict with each other." [Inst 34, p. 15]. Appellee supplied no citation to a learned treatise to support that proposition.

In appellants response on February 5, 1997, *Plaintiff's Reply to Defendant John Devine's Memorandum of Law and Amended Motion to Dismiss*, appellants replied to the content of Judge Devine's biblical display as follows: "In order to mute their significance in a non-courtroom educational setting, there would have to be other codices presented . . ., references from the Christian scriptures (**noticeably lacking in the defendant's alleged 'Christian' display**)." [Inst. 36, p. 4, emphasis added]. Appellants had also provided the court below with an analysis of the content of the display. *See* Inst. 33, p. 24.

On March 11, 1997, it became public knowledge that the appellee had changed courtrooms, moved the five cited texts into the jury box itself, and added two additional texts: a diptych containing citations from the biblical books of Genesis and Revelation. The latter book is from the Christian scriptures. This matter of changing the *status quo ante* was brought to the court's attention via an urgent letter dated

March 17, 1997, copy to opposing counsel. For reasons unknown to the appellants, that letter was not included in the district court record. Consequently, appellants ask for leave to file that letter of record in this appeal. Appellants also seek leave to file a self-authenticating videotape copy of the KPRC-TV broadcast to which reference is made in the March 17 letter. A copy of both these items, proposed to be filed, is attached.[1]

Respectfully submitted,

/s/ Derek H. Davis
DEREK H. DAVIS, PH.D., J.D.
N.D.Tex. I.D. No. 054749400
J. M. DAWSON INSTITUTE
BAYLOR UNIVERSITY
P.O. Box 97308
Waco, TX 76798-7308
254-710-1510
254-710-1571 Facsimile

COUNSEL FOR APPELLANT
MARIA TERESA MEDINA

Respectfully submitted,

/s/ Daniel Shea
DANIEL J. SHEA, S.T.B., J.D.
S.D.Tex. I.D. No. 12585
1001 Fannin, Suite 4660
Houston, TX 77002-6712
713-651-7800
713-652-9051Facsimile

LEAD COUNSEL FOR
APPELLANT
RAMON A. MEDINA, P.E.

CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that at least ten days prior to this filing a telephonic message was left for opposing counsel in an attempt to obtain a stipulation under FED. R. APP. P. 16(b). No response was forthcoming.

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[1] The videotape is in a sealed envelope attached to the original of this motion. Copies of the March 17 letter are attached to both the original and the copies. Opposing counsel is also provided with a copy of the videotape and letter.

/s/ Daniel Shea
DANIEL J. SHEA

CERTIFICATE OF FILING AND SERVICE

The undersigned counsel hereby certifies that the *Appellants' Motion for Leave to File a Corrected Record* in the above captioned case has been filed and served in accordance with FED. R. APP. P. 25(d) and Local Rule 31.1 on the 6th day of August, 1997 as indicated below:

Mr. Charles R. Fulbruge III, Clerk U.S. Court of Appeals for the Fifth Circuit 600 Camp St. New Orleans, LA 70130-3479	U.S. Mail, First Class four (4) copies
Mr. Richard C. Geisler, Jr. Office of the Texas Attorney General General Litigation Division P.O. Box 12548 Austin, TX 78711-2548 ATTORNEY FOR APPELLEE	U.S. Mail, First Class two (2) copies

/s/ Daniel Shea
DANIEL J. SHEA

United States Court of Appeals
for the Fifth Circuit

OFFICE OF THE CLERK
CHARLES R. FULBRUGE II
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

August 21, 1997

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 971-20369 Medina v. Devine
USDC No. H-96-CV-2485

The motion to supplement or correct the record has been granted in the appeal referenced above.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

/s/ J. Wynne
Jann Wynne Deputy Clerk

Mr Daniel Joseph Shea
Mr Peter John Riga
Mr Derek Hamilton Davis
Mr Richard C Geisler Jr
Mr Michael N Milby, Clerk

P.S. to clerk: Enclosed is the one volume record and 1 envelope of exhibits. Please include with the record on appeal and forward all when requested.

DANIEL J. SHEA, P.C.
1001 Fannin, Suite 4660, Houston, TX 77002-6712
713-651-7800 Facsimile: 713-652-9051

March 17, 1997

URGENT

Hon. Frances H. Stacy
United States Magistrate Judge
515 Rusk
Houston, TX 77002

Via Facsimile: 713-250-5055

RE: Case No. H-96-2485; *Ramon A. Medina, P.E. et al., and Houston Federation of Teachers, (Intervenor) v. Hon. John P. Devine*; In the United States District Court for the Southern District of Texas, Houston Division.

Dear Judge Stacy:

We would ask Your Honor to take judicial notice of several significant events of this past week that make this case one that now requires your urgent attention.

First, the Governor of Alabama, Fob James, has indicated he will summon the State National Guard to prevent execution of a Federal injunction dealing with religious issues.[1] He has also indicated he will use the Alabama State Police, over which he does have control, to prevent a superior court ordering an Alabama Judge to remove his display of the Ten Commandments, the identical Calvinist version of which is on display in this case. Thus we have the potential for a small civil war in Alabama and potentially acute embarrassment to Hon. George W. Bush, Governor of Texas, and son of a Former President of the United States. Next, one of our local congresspersons, Mr. DeLay, R.--TX, has indicated he will introduce legislation in Congress to impeach article III federal judges because they issue opinions with

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[1] While Gov. James may summon the National Guard, its Commander-in-Chief is William Jefferson Clinton.

which he and others happen to disagree. Mr. DeLay's action has elicited a warning from the Attorney General of the United States, the Honorable Janet Reno, to the effect that Mr. DeLay is precipitating a constitutional crisis. I agree with the Attorney General and I am sure you do too.[2]

Locally, with respect to this case, you may judicially note the appearance of Judge Devine on KTRK-TV from the 190th courtroom on March 11, 1997. That telecast shows that Judge Devine has moved the 190th District Court of Harris County from 1019 Congress to the Main Courthouse at 301 Fannin. In the process, he has moved the five Hebrew biblical texts previously on the wall facing the jury into the jury box itself. To the wall facing the jury, he has now added two additional biblical tests, one from Genesis, the other from Revelation -- a definite theological message.[3] The Ten Commandments and two presidents-kneeling-in-prayer occupy the same position over the witness box and judge as reflected in the record of this case. From this action of changing the *status quo ante*, it is clear that Judge Devine either is prejudging your decision or intends to ignore it. Further, absent your immediate intervention, this will necessitate the filing of another lawsuit to address the new articles.[4]

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[2] While Judge Harmon has graciously removed herself from this case on the consent of the parties to be heard before you, a United States Magistrate, I am certain that Judge Harmon who sits for life as an article III Judge would agree with the positions taken by the United States Attorney General and the plaintiff and the intervenor in this case.

[3] One of the tools of biblical exegesis is the phenomenon of *amphictyone* or bracketing. Here, the two new sacred texts, displayed side-by-side in the same frame, are from the books of Genesis and Revelation -- the book of the beginning times and the book of the end times. This is a clear theological message, not some unintentional display.

[4] Judge Devine has *sua sponte* and "voluntarily" recused himself from the Medina case in an attempt to moot the controversy here. The Presiding Judge has assigned Hon. I. Allen Lerner to hear the case. Upon entering the 190th for the first time, Judge Lerner told the parties he will abide by the findings of fact and conclusions of law of Hon. Andrew Z. Baker (First Amendment violation), previously filed as a basis of summary judgment in this case.

There is a common thread that runs through all of these unconstitutional acts. It is the Calvinist notion that human beings are incapable of self-governance absent intervention of divine revelation and divinely appointed judges. I have briefed that subject before this Court and respectfully ask you to revisit that brief.

I must also now ask for an immediate ruling on this matter, at least in terms of a temporary restraining order.[5] Otherwise, the gravity of the constitutional issues at hand here and in the nation require that I must otherwise seek to compel a ruling by petition for writ of mandamus to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Daniel Shea
Daniel J. Shea

cc: Hon. William J. Clinton, President of the United States
Hon. Janet Reno, Attorney General of the United States
Hon. Tom DeLay, (R.--TX)
Mr. Chad Geisler, Assistant Texas Attorney General

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[5] We have indicated elsewhere in this case that we anticipate a memorandum opinion, for which reason we did not submit a proposed Order. We have attributed the delay in your opinion to this factor.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-20369

RAMON A MEDINA, P E, Individually and as Parent of Luis-Francisco Emmanuel Medina, Deceased; MARIA TERESA MEDINA, Individually and as Parent of Luis-Francisco Emmanuel Medina, Deceased

Plaintiffs - Appellants

V.

JOHN P DEVINE, Honorable; ET AL
Defendants

JOHN P DEVINE, Honorable
Defendant - Appellee

U.S. COURT OF APPEALS

F I L E D SEP I 0 1997

CHARLES R. FULBRIDGE III
CLERK

Appeals from the United States District Court for the Southern District of Texas, Houston

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O R D E R

IT IS ORDERED that the motion of appellants to expedite the appeal is GRANTED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

MOT-14